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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

GERARD T. OUIMETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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147 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the court erred in sentencing the petitioner to life imprisonment, a term well in excess of the twenty year statutory maximum for the offense of conviction, under an entirely separate statute not charged in the indictment, based on the judge's findings of aggravating facts, without any jury and not beyond a reasonable doubt, in violation of the Fifth and Sixth Amendments as set forth in *Apprendi* v. *New Jersey*.

II. Whether the recidivism exception of *Almendarez-Torres* v. *United States* should be overruled.

III. Whether the recidivism exception of *Almendarez-Torres* v. *United States* is applicable where petitioner did not "admit" to the prior convictions used to enhance his sentence, nor were they obtained "pursuant to proceedings with substantial procedural safeguards of their own", and where the prior convictions were obtained in violation of petitioner's constitutional rights.

IV. Whether the "three strikes" portion of 18 U.S.C. §3559(c) is unconstitutional on its face and as applied in the instant case because it shifts the burden of proof to the petitioner to prove by clear and convincing evidence that the convictions used to enhance his sentence were nonqualifying felonies under the statute.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The Opinion of the United States Court of Appeals for the First Circuit, dated February 21, 2002, is attached hereto (A. 1a).*

JURISDICTION

This case seeks review of a decision of the United States Court of Appeals for the First Circuit entered on February 21, 2002. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the District of Rhode Island of conspiring to use extortionate means to collect extensions of credit and aiding and abetting the use of extortionate means to collect extensions of credit in violation of 18 U.S.C. §894, which provides for a maximum term of

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* References designated herein as (A.) are to petitioner's Record Appendix.

imprisonment of not more than twenty years.[1] Petitioner was sentenced, however, to life imprisonment pursuant to the "three strikes" provision of 18 U.S.C. §3559(c)(1)(A), an entirely separate statute that was not charged in the indictment, that no jury has ever convicted him of violating, and that no trier of fact, judge or jury, has ever determined that he is guilty of beyond a reasonable doubt. The enhanced sentence was based on the sentencing judge's findings of aggravating facts necessary to establish that both the offense of conviction and two other prior convictions constituted "serious violent felonies" as that term is defined within the statute. Following the denial of his direct appeal and his petition for certiorari, on October 4, 1999, petitioner timely filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. §2255.

Relying in part on this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioner argued in his 2255 motion that the district court erred in sentencing him to life imprisonment pursuant to 18 U.S.C. §3559(c) in violation of his rights under the Fifth and Sixth Amendments, and thus, the sentence was imposed in violation of the Constitution or laws of the United States, the court was without jurisdiction to impose such sentence, the sentence was in excess of the maximum authorized by law, and was otherwise subject to collateral attack. Petitioner also argued that two predicate offenses that provided the basis for his sentence enhancement were obtained in violation of petitioner's constitutional rights, i.e. that the 1958 plea was obtained without the benefit of counsel and was not voluntarily and intelligently given, and that the 1976 plea was involuntary and without any factual basis.

In denying the petitioner's motion with regard to the *Apprendi* issues, the district court ruled that *Ap-*

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[1] The factual background of petitioner's case is set forth in *United States* v. *DeLuca*, 137 F.3d 24 (1st Cir. 1998), *cert. denied*, 525 U.S. 917 (1998).

prendi does not apply when the sentencing enhancement is based on the fact of a prior conviction. The district court also rejected the petitioner's argument that 18 U.S.C. §3559 was unconstitutional, and further ruled that petitioner's state court convictions could not be collaterally attacked in a federal sentencing proceeding, or in §2255 proceedings, except on the ground that they were uncounseled (A. 14a-15a).

The First Circuit Court of Appeals affirmed, rejecting petitioner's *Apprendi* based arguments by relying on its own decision in *United States* v. *Gomez-Estrada*, 273 F.3d 400 (1st Cir. 2001) (A. 1a-2a). In that decision, the First Circuit stated that it was bound to follow *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and that the holding of *Almendarez-Torres* is not limited to cases where the defendant admits the commission of the prior offenses used for sentence enhancement. The court also held in the instant case that even if petitioner had the right to collaterally challenge his 1958 conviction on the ground that it was uncounseled in accordance with *Custis v. United States*, 511 U.S. 485 (1994), such challenge would not have mattered since petitioner had two other prior convictions that were counseled (A. 2a).

REASONS FOR GRANTING THE WRIT

The basis for the enhancement of petitioner's sentence from a maximum of twenty years under the statute he was convicted by the jury of violating, 18 U.S.C. §894, to life imprisonment under the "three strikes" provision of 18 U.S.C. §3559(c)(1)(A), was the sentencing judge's findings, without any jury and not beyond a reasonable doubt, of aggravating facts necessary to establish that both the offense of conviction, and at least two or more convictions on separate prior occasions, constituted "serious violent felonies" as

that term is defined within the statute.[2] The three strikes statute was never mentioned in the indictment, nor were its elements ever presented to the jury for consideration under a reasonable doubt standard of proof. Instead, the burden was imposed on petitioner to prove that the convictions were nonqualifying felonies under the statute.

Petitioner was never afforded an opportunity to challenge two of the convictions used to enhance his sentence, one from 1958 and the other from 1976, on the basis that they were obtained in violation of petitioner's constitutional rights. The sentencing judge, and later the First Circuit, ruled that the state court convictions could not be collaterally attacked in a federal sentencing proceeding, or in §2255 proceedings, except on the ground that they were uncounseled.

This case presents the opportunity for the Court to further define the scope of its decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), by overruling *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) and announcing that the recidivism exception is no longer viable, or limiting *Almendarez-Torres*' applicability to cases where the defendant does not contest the prior convictions and where they were obtained "pursuant to proceedings with substantial procedural safeguards of their own", and not in violation of a defendant's constitutional rights.

I. THE COURT ERRED IN SENTENCING THE PETITIONER TO LIFE IMPRISONMENT, A TERM WELL IN EXCESS OF THE TWENTY YEAR STATUTORY MAXIMUM FOR THE OFFENSE OF CONVICTION, UNDER AN ENTIRELY SEPARATE STATUTE NOT CHARGED IN THE INDICTMENT BASED ON THE JUDGE'S FINDINGS OF AGGRAVATING FACTS, WITHOUT ANY JURY AND

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[2] Prior to sentencing, petitioner challenged whether the convictions constituted "serious violent felonies" as defined within the statute.

NOT BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS AS SET FORTH IN *APPRENDI* v. NEW JERSEY.

In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum", whether the statute calls it an element or a sentencing factor, "must be submitted to a jury and proven beyond a reasonable doubt". *Id.*, at 490; *Harris* v. *United States*, 536 U.S. ___ (2002); *Ring* v. *Arizona*, 536 U.S. ___ (2002). "In federal prosecutions, such facts must also be charged in the indictment." *United States* v. *Cotton*, 2002 U.S. Lexis 3565 (2002), citing *Apprendi*, *supra*, at 476 (quoting *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)).

In *Apprendi*, the Court established that "any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime — and thus the domain of the jury — by those who framed the Bill of Rights." *Harris* v. *United States*, 536 U.S. ___. The Court explained that

> The dispositive question 'is one not of form, but of effect.' If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, the fact — no matter how the state labels it — must be found by a jury beyond a reasonable doubt. A defendant may not be 'exposed . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'

Ring v. *Arizona*, 536 U.S. ___ (2002), quoting *Apprendi*, *supra*, at 482-83, 494. The Court concluded that historically, "facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal of-

fense." *Apprendi*, at 483. *See also, Harris* v. *United States*, 536 U.S. ___. Thus, if an increase in the maximum sentence available for the offense of conviction is contingent on the finding of facts — in the instant case, facts establishing that the offense of conviction and two or more prior convictions constituted "serious violent felonies" as that term is defined in the statute providing for the enhanced term of imprisonment — those facts are "elements" of a separate, aggravated offense, and must be charged in an indictment, and proven beyond a reasonable doubt to a jury. *Apprendi, supra*, at 501. *See also, Ring* v. *Arizona*, 536 U.S. ___; *Harris* v. *United States*, 536 U.S. ___.[3]

In the instant case, proving facts necessary for life imprisonment under 18 U.S.C. §3559(c) requires much more than merely proving the existence of prior convictions. It must be determined that the offense of conviction was a "serious violent felony" as that term is defined within the statute, and that defendant had been convicted on separate prior occasions of two or more "serious violent felonies".[4] In this regard, the

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[3] Under well-established constitutional doctrine, the Constitution's full procedural protections, especially the necessity of proof beyond a reasonable doubt to a jury at trial, apply to elements of offenses. *Apprendi*, 530 U.S. at 476-79; *Jones* v. *United States*, 526 U.S. 227, 232 (1999) (stating that "elements must be . . . proven by the Government beyond a reasonable doubt.")

[4] The petitioner challenged whether any of the offenses were qualifying felonies within the meaning of the statute. The sentencing judge ruled that the state court convictions could not be collaterally attacked in a federal sentencing proceeding except on the ground that they were uncounseled, relying on this Court's decisions in *Custis* v. *United States*, 511 U.S. 485 (1994) and *Daniels* v. *United States*, 532 U.S. 374 (2001). The First Circuit affirmed. This was error. Both *Custis* and *Daniels* involved the Armed Career Criminal Act (ACCA) which is a different statute than that under which petitioner was sentenced, i.e., 18 U.S.C. §3559. The latter statute specifically provides a forum to challenge the predicate offenses at the sentencing hearing unlike the ACCA. *See*, 18 U.S.C. §3559(c)(4)'s specific reference to, and incorporation of, the

sentencing judge made the following critical findings of fact as required by the statute.

The sentencing judge was first required to make a finding whether the crime for which petitioner was indicted, tried and convicted, collection of extensions of credit by extortionate means, constituted a "serious violent felony" as defined within the statute. In this regard, the judge commented that in looking at the definition section of the statute, specifically 18 U.S.C. §3559(F)(i), "there are certainly some questions raised." (A. 23a). The judge pointed out that the offenses enumerated "are described under the section by generic name and reference to the federal statute defining them, and there are offenses that are described only by generic name." (A. 23a) He pointed out that the offense of conviction was "not included in the first category, nor is it included in the second category unless it is encompassed by the generic term extortion." (A. 23a) The judge was thus required to make a determination whether the offense of conviction came "within the ambit of the generic term extortion." (A. 23a) The judge ultimately found that the offense of conviction did fall within the generic term "extortion" used in the statute (A. 23a-24a). In so

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procedures set forth in 21 U.S.C. §851 by which a defendant who is subject to a sentence enhancement may challenge the constitutionality of an earlier conviction that is the basis for the enhancement. *See also, Custis* v. *United States, supra*, at 492 ("[W]hen Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so", referring to 21 U.S.C. §851(c)). In addition, the 1958 conviction was unconstitutionally obtained in violation of petitioner's right to counsel and the *Custis* and *Daniels* opinions specifically state that their holdings do not apply to such situations. As argued hereinafter, no "presumption of regularity" applies to petitioner's 1958 conviction and thus petitioner must be allowed to challenge that conviction in federal court. Contrast *Daniels, supra.* Moreover, the petitioner in *Daniels*, unlike here, did not place any transcript or other evidence relating to his plea colloquies before the Court for review, and the pleas in issue there were given in 1978 and 1981, well after *Boykin* v. *Alabama* was decided.

finding, both the judge, and later the First Circuit which affirmed the judge's finding, were required to look beyond the label of the offense to the factual circumstances of the underlying case since, on its face, the offense of conviction did not necessarily fall within the generic definition of "extortion". *See, United States* v. *DeLuca, supra*, 137 F. 3d at 39-40.

The judge next proceeded to determine whether the petitioner had previously been convicted of two or more "serious violent felonies" as defined in the statute. With regard to the petitioner's 1958 robbery plea, the judge found that the elements of robbery under state law are "virtually identical" to those under the federal statutes specifically referred to in §3559 (A. 25a). The judge acknowledged that under the statute, robbery may not be considered as a qualifying felony if the defendant established by clear and convincing evidence that there was no use or threat of use of a firearm or other dangerous weapon (A. 25a). However, the judge then made a finding based solely on a presentence report that a firearm was involved, and thus the robbery offense qualified as a "serious violent felony" (A. 25a). The judge was thus again required to look beyond the label of the offense and consider the underlying factual circumstances of the case in order to determine that the robbery was a qualifying felony under the statute. The judge further found that the robbery qualified, in the alternative, "as an offense that has as an element the use or threatened use of physical force against the person of another" or that, "by its nature, involved a substantial risk that physical force may be used in the course of committing the offense." (A. 25a-26a).[5]

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[5] This was error. If a defendant established by clear and convincing evidence that no firearm or other dangerous weapon was used in the offense and no threat of same was involved, and the offense did not result in death or serious bodily injury to any person, then the robbery could not serve as a basis for sentencing under the statute.

With regard to petitioner's 1976 plea for assault with a dangerous weapon, the judge found this offense to also qualify under the statute because even though it was not an enumerated offense, "it has as an element the use or attempted use or threatened use of physical force against the person of another" or "by its nature involved a substantial risk that physical force may be used against the person of another in the course of committing the offense". (A. 26a).[6]

The facts found by the judge constituted "elements" of a separate, aggravated offense that had to be charged in an indictment and proven beyond a reasonable doubt to a jury. *Apprendi, supra.* None of that happened in this case.

First, none of the foregoing facts found by the judge, nor the prior offenses used to enhance the petitioner's sentence, were charged in the indictment under which petitioner was convicted, in violation of his Fifth Amendment rights to due process of law and to a grand jury indictment. The indictment charged petitioner with violations of 18 U.S.C. §894. The petitioner was sentenced, however, to life imprisonment under an entirely separate statute, 18 U.S.C. §3559(c). The latter is not a subsection of the former. *Compare, Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). 18 U.S.C. §3559(c) prescribes a separate, aggravated crime with its own punishment which is far more severe than the offense for which petitioner was indicted, tried and convicted — mandatory life imprisonment as opposed to twenty years maximum. Nowhere in the indictment is 18 U.S.C. §3559(c) referred to. Nor does the indictment refer to any of the elements of 18 U.S.C. §3559(c)(2)(F) that must be proven in order for a term of life imprisonment to be im-

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[6] Again, this was error for the same reasons stated in footnote 5.

posed.[7] The indictment also does not refer to the prior convictions that were determined by the judge to qualify as "serious violent felonies" under the statute and used to impose the term of life imprisonment on petitioner. No evidence of any of these elements of the statute were presented to the grand jury, or the petite jury for that matter. Finally, 18 U.S.C. §3559(c)(4) specifically states that the provisions of 21 U.S.C. §851(a) shall apply to the imposition of sentence under this subsection. 21 U.S.C. §851(a)(2) provides that "[a]n information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed." The statute's reference to "the offense for which the increased punishment may be imposed" is necessarily 18 U.S.C §3559(c) since the maximum punishment that may be imposed for an offense under 18 U.S.C. §894 is twenty years. Thus, no information was entitled to be filed in this case seeking an increased punishment of life imprisonment as opposed to twenty years, since, as stated, nowhere in the indictment is 18 U.S.C. §3559(c) referred to.

Second, the aggravating facts found by the judge were not submitted to any jury for their consideration. This violation of the petitioner's Fifth and Sixth Amendment rights was especially pronounced with respect to the 1958 robbery and the 1976 assault charges which, in order for them to be qualifying felonies under 18 U.S.C. §3559(c), must involve additional elements, i.e., the use of a firearm or other dangerous weapon, and death or serious bodily injury to a person, which elements were never submitted to the jury for consideration.

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[7] An offense of conviction constituting a "serious violent felony" and final convictions on separate prior occasions of two or more "serious violent felonies".

Third, no finding was ever made by any jury, or the judge for that matter, that the aggravating facts had been proven beyond a reasonable doubt. In fact, no such finding was ever made even by a preponderance of the evidence. The record is devoid of any finding in this regard. (A. 16a-33a). No evidentiary burden was placed on the government at all to prove the aggravating facts necessary to establish that the offense of conviction, and at least two prior convictions, constituted "serious violent felonies" as defined in the statute. No evidence was offered by the government at all. Instead, the judge relied solely on the presentence report for proof of these elements.[8] The judge also made no finding that the petitioner was guilty of the prior offenses beyond a reasonable doubt.

Accordingly, as the sentencing judge, without a jury and not beyond a reasonable doubt, found aggravating facts necessary for imposition of a term of imprisonment far in excess of the statutory maximum for the offense of conviction, under a separate statute not charged in the indictment, this was a violation of petitioner's rights under the Fifth and Sixth Amendments. His sentence must therefore be vacated, and the case remanded for resentencing to a term not to exceed the maximum penalty under 18 U.S.C. §894, the offense of conviction.

II. THE RECIDIVISM EXCEPTION OF *ALMENDAREZ-TORRES* v. *UNITED STATES* HAS NO RATIONAL BASIS AND SHOULD BE OVERRULED.

In upholding the district court's enhancement of petitioner's sentence to life imprisonment based in part on two prior felony convictions, the First Circuit relied on this Court's decision in *Almendarez-Torres* v. *United States* and its treatment of recidivism as a

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[8] In this regard, see *United States* v. *Dueno*, 171 F. 3d 3, 7 (1st Cir. 1999).

"sentencing factor" rather than as an "element" of a separate offense. In *Apprendi*, the Court did not explicitly overrule *Almendarez-Torres* because Apprendi did not contest the decision's validity:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today . . .

530 U.S. at 488-90 (emphasis added). It should also be noted that *Almendarez-Torres* specifically concerned only the sufficiency of the indictment. *See, id.*, 523 U.S. at 247-48; *Apprendi*, 530 U.S. at 488.

Petitioner submits that prior convictions used to enhance a sentence beyond the statutory maximum for the offense of conviction are elements of a separate, aggravated offense that must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt.

> [I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, including the fact of a prior conviction—the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact . . . that fact is also an element.

Apprendi, supra, at 501 (Justice Thomas, with whom Justice Scalia joined, concurring). *See also, Harris* v. *United States, supra*, 536 U.S. ___. (Justice Thomas, with whom Justice Stevens, Justice Souter, and Justice Ginsburg joined, dissenting). "[T]here is no ra-

tional basis for making recidivism an exception." *Almendarez-Torres, supra*, at 258 (Justice Scalia, with whom Justice Stevens, Justice Souter, and Justice Ginsburg joined, dissenting). *See also, Monge* v. *California*, 524 U.S. 721, 741 (1998) (the holding of *Almendarez-Torres* was "in my view a grave constitutional error affecting the most fundamental of rights" (Justice Scalia, with whom Justice Souter and Justice Ginsburg joined, dissenting)). The time has come for this Court to overrule *Almendarez-Torres*.

III. THE RECIDIVISM EXCEPTION IS NOT APPLICABLE WHERE PETITIONER DID NOT "ADMIT" TO THE PRIOR CONVICTIONS, NOR WERE THEY OBTAINED "PURSUANT TO PROCEEDINGS WITH SUBSTANTIAL PROCEDURAL SAFEGUARDS OF THEIR OWN", AND WHERE THEY WERE OBTAINED IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

The recidivism exception, if at all viable, is only applicable where a defendant admits to the earlier convictions and does not challenge their accuracy, and there is certainty that the convictions were entered pursuant to proceedings with substantial procedural safeguards of their own to ensure that they were not obtained in violation of the defendant's constitutional rights:

> Because *Almendarez-Torres* had admitted the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own—no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.
>
> . . .
>
> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that *Almendarez-Torres* did not challenge

> the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.

Apprendi, at 488. *See also, United States* v. *Tucker*, 404 U.S. 443, 449 (1972); *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967)(convictions obtained in violation of a defendant's constitutional rights cannot be used against a person either to support guilt or enhance punishment for another offense). Such is not the case here. Petitioner's 1958 and 1976 pleas were improperly used to enhance his sentence because they were not "admitted" by petitioner and were not "entered pursuant to proceedings with substantial procedural safeguards of their own", and were obtained in violation of petitioner's constitutional rights, as demonstrated hereinafter.

1958 Plea.

On October 22, 1958, the petitioner was arraigned in the Superior Court of Rhode Island on a charge of armed robbery and pleaded not guilty. The petitioner returned to the Superior Court on December 12, 1958, and a plea of *nolo contendere* was entered to the armed robbery charge. On January 12, 1959, the Superior Court sentenced and committed the petitioner to six years imprisonment in the state prison.

On September 14, 1998, in response to his sentence enhancement in the United States District Court, the petitioner applied to the Rhode Island Superior Court to vacate the *nolo contendere* plea entered in 1958 by filing an application for post conviction relief pursuant to R.I. G.L. 1956 Section 10-9.1-1 *et seq.*

On March 16, 1999, the Superior Court conducted an evidentiary hearing on the petitioner's motion. At the hearing, no stenographic transcript of the 1958

plea hearings was available.[9] The petitioner testified that he never hired a lawyer to represent him and was never advised by the court that he had a right to have a lawyer represent him, or that any lawyer had been appointed to represent him (A. 38a, 39a, 40a, 41a, 42a).[10] In fact, he never spoke to a lawyer between his arraignment and when he was sentenced (A. 39a, 40a, 42a, 49a, 68a). He was never asked any questions by the court and was not advised that by pleading guilty he was waiving certain constitutional rights, nor was he asked to waive ~~any~~ rights (A. 41a, 43a). The clerk entered the plea on his behalf and he never spoke (A. 40a, 43a, 66a-67a). The petitioner also testified that he was innocent of the robbery charge (A. 58a, 68a, 70a).

The State offered no evidence to rebut or challenge any of these facts (A. 71a, 72a, 73a). The Superior Court found that the State was unable to directly rebut or challenge the petitioner's evidence. Notwithstanding this, the court found that petitioner's evidence was not sufficient to overcome the "presumption of regularity" that attaches to final judgments, or to meet his evidentiary burden of proving that his plea was not entered willingly or knowingly. The court thus denied the petitioner's motion to vacate the 1958 plea.

The petitioner appealed the decision of the Superior Court to the Supreme Court of Rhode Island. On December 14, 2001, the Rhode Island Supreme Court affirmed, finding that in collateral proceedings attacking the validity of a conviction used for purposes of sentence enhancement, the "presumption of regular-

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[9] The facts set forth herein are taken from the transcript of petitioner's testimony at a hearing in Superior Court in Rhode Island, 3/16/99, on petitioner's application for post-conviction relief. The transcript is included in the Appendix submitted herewith.

[10] The plea was given prior to the Supreme Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 355 (1963).

ity" attaches to a final judgment of conviction notwithstanding the absence of a record, and that defendant had failed to prove that his 1958 conviction was not knowing and voluntary by a preponderance of the evidence. The court further found that petitioner was represented by counsel at his 1958 plea hearing, and had failed to demonstrate that his counsel was ineffective. *Ouimette* v. *State*, 2001 WL 163667 (R.I. 2001), *cert. denied*, 536 U.S. ___ (2002).

A. The Petitioner's 1958 Plea Was Not Knowingly, Intelligently, And Voluntarily Made.

1. Uncontroverted evidence establishing that the 1958 plea was not knowing and voluntary.

No stenographic transcript of the 1958 plea hearing is available. At the evidentiary hearing in Superior Court on petitioner's motion to vacate the 1958 plea, petitioner testified that when the plea was entered he was eighteen years old and had the benefit of a limited, seventh or eighth grade education (A. 36a, 38a). He had no prior exposure to the Superior Court (A. 37a).[11] He never hired a lawyer to represent him and

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[11] The Superior Court's finding that defendant had prior experience with the criminal justice system prior to making the 1958 plea was erroneous. After petitioner argued this in his brief to the Supreme Court of Rhode Island, the State conducted its own investigation which revealed that petitioner did not in fact have prior experience with the criminal justice system such that he would have been aware of the implications of a *nolo* plea the time of his 1958 plea hearing, and so stated in its brief and at oral argument. The Rhode Island Supreme Court did not note this in its opinion, apparently believing this fact to be of no consequence to its decision. In any event, prior experience with the criminal justice system at a time when the procedures followed in accepting pleas are acknowledged to have been constitutionally deficient, [*see, Bishop* v. *Langlois*, 106 R.I. 56, 63 (1969)], it is submitted, lends no support to a finding that petitioner's plea at a later time was "knowing and intelligent" based on the petitioner's prior experience.

was never advised by the Court that he had a right to have an attorney represent him, or that any lawyer had been appointed to represent him (A. 38a, 39a, 40a, 41a, 42a). He never spoke to any lawyer between his arraignment and when he was sentenced (A. 39a, 40a, 42a, 51a, 68a). He was never asked any questions by the court and was not advised that by pleading guilty he was waiving certain constitutional rights, nor was he asked to waive any rights (A. 41a, 43a). The clerk entered the plea on his behalf and he never spoke (A. 40a, 43a, 66a-67a). The petitioner also testified that he was, in fact, innocent of the robbery charge (A.58a, 68a, 70a).

This evidence was uncontroverted. The State offered no evidence to rebut or challenge any of these facts, despite being invited to do so by the trial court on four separate occasions (A. 71a, 72a, 73a). Indeed, the trial court specifically found that the State was unable to directly rebut or challenge the petitioner's evidence.

2. No presumption of regularity applies to petitioner's 1958 plea.

Despite the petitioner's uncontroverted evidence, the Superior Court, relying on this Court's decision in *Parke* v. *Raley*, 506 U.S. 20 (1992), found that the petitioner had not presented sufficient evidence to overcome the "presumption of regularity" that attaches to criminal convictions and final judgments and denied petitioner's motion to vacate the 1958 plea. In affirming that decision, the Supreme Court of Rhode Island stated, in pertinent part:

> Although, as Ouimette points out, Raley's plea was entered in 1986[12] years after *Boykin* colloquies became mandatory, we remain satisfied that, in collateral proceedings attacking the valid-

[12] The pleas in issue in *Parke* v. *Raley*, 506 U.S. 20 (1992), were entered in 1979 and 1981, not 1986.

> ity of a conviction used for the purposes of sentence enhancement, the presumption of regularity attaches to a final judgment of conviction, notwithstanding the absence of a record. . . In the present case, without question, the presumption of regularity governs our consideration of the validity of Ouimette's 1958 plea . . .

Ouimette v. *State*, 2001 WL 1636671 (R.I. 2001). In so holding, the court overextended this Court's decision in *Parke* v. *Raley* with a result that directly conflicts with prior decisions of this Court, specifically *Boykin* v. *Alabama, supra; Burgett* v. *Texas*, 389 U.S. 109 (1967); and *Carnley* v. *Cochran*, 369 U.S. 506 (1962).

The "presumption of regularity" does not apply to a plea that was given in 1958, eleven years before *Boykin* v. *Alabama* was decided, where the record is silent concerning waiver. Unlike the 1979 and 1981 pleas in *Parke* v. *Raley*, here *Boykin* colloquies had not been "required for nearly a quarter century", and were not "well established" in 1958. *Parke* v. *Raley, supra*, at 30, 31. In fact, at the time the petitioner's plea was entered, his federal constitutional rights to trial by jury, to confront one's accusers, and his privilege against compulsory self-incrimination had not yet been recognized as applicable to the states. *See, Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Malloy* v. *Hogan*, 378 U.S. 1 (1964). It "defies logic", therefore, to presume that the petitioner was advised of such rights or to presume that he was asked to waive same and did so. *Cf. Parke* v. *Raley, supra*, at 31. On the contrary, it is reasonable to presume that he was not advised of rights he did not yet possess and thus did not waive same. *Burgett* v. *Texas, supra*, at 114-15; *cf. Parke* v. *Raley, supra*, at 31. As this Court stated in *Johnson* v. *Zerbst*, 304 U.S. at 458, 464 (1938): "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and we do not presume acquiescence in the loss of fundamental rights. A

waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

The Supreme Court of the State of Rhode Island, where the plea was given, has acknowledged that at the time petitioner's plea was given, "defendants were rarely informed by the court or, for that matter counsel, of the effect upon their constitutional rights of a plea of nolo contendere or guilty". *Bishop* v. *Langlois*, 106 R.I. 56, 63 (1969). Accordingly, there can be no "presumption of regularity" in this case, and the court erred in relying on same to uphold the validity of petitioner's 1958 plea.

Furthermore, as there is a silent record, and no presumption of regularity applies, the plea is presumptively void. *Boykin* v. *Alabama, supra*, at 242-44. Coupled with the petitioner's uncontroverted evidence that he was never advised that by pleading guilty he was waiving certain constitutional rights and was never asked to waive any such rights, the fact that petitioner had no prior experience with the criminal justice system, and that petitioner was never afforded assistance of counsel during his 1958 plea hearing, as demonstrated hereinafter, his 1958 plea cannot stand and must be vacated.

3. It was a violation of due process to shift the burden of proof to the petitioner to prove the invalidity of the 1958 plea by a preponderance of the evidence.

The Rhode Island Supreme Court held that petitioner had the burden of proving that his plea was not entered willingly and knowingly, and had failed to overcome the presumption of validity of the plea by a preponderance of the evidence. 2001 WL 1636671 at 4. Petitioner submits that it was a violation of due process to shift the burden of proof to petitioner to prove the invalidity of the 1958 plea by a preponderance of the evidence.

In *Carnley* v. *Cochran*, 369 U.S. 506 (1962), the Court held that no burden can be imposed upon an accused to demonstrate waiver of counsel unless the record reveals that the accused intelligently and understandingly acquiesced to the waiver. *Id.* at 516-17. In *Boykin* v. *Alabama, supra*, the Court held that the same standard must be applied in determining whether a guilty plea is voluntarily made. 395 U.S. at 242.

In the instant case, the record is silent concerning the petitioner's waiver of his constitutional rights. The court below, however, placed the burden of proof on the petitioner to overcome the presumption of regularity that attaches to pleas that have become final. As demonstrated above, no presumption of regularity applies in the circumstances of this case. And because no waiver of constitutional rights can be presumed from a silent record, it was a violation of due process to place the burden on the petitioner to prove the absence of a knowing and intelligent waiver by a preponderance of the evidence. *Carnley* v. *Cochran, supra*, at 516-17. In addition, the petitioner testified that he was never advised of the constitutional protections that he was waiving by pleading *nolo contendere*, nor was he asked to waive any such rights. This evidence was uncontradicted.

Thus, as the record is silent, and the uncontradicted evidence produced by petitioner established that the 1958 plea was not knowing and voluntarily, it was obtained in violation of due process and is therefore void. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).

Finally, the petitioner's 1958 conviction was an "element" of a separate offense, 18 U.S.C. §3559 (c)(1)(A), for which he was sentenced to life imprisonment — a term well beyond the statutory maximum for the offense he was actually indicted for, tried and convicted by the jury, *i.e.*, 18 U.S.C. §894. It was thus the State's burden to prove beyond a reasonable doubt

each and every "element" of that offense, including that the 1958 conviction was obtained by constitutional means. Accordingly, it was a violation of due process for the Rhode Island Supreme Court to rely on a presumption of regularity to shift the burden of proof to the petitioner to demonstrate the invalidity of the 1958 conviction by a preponderance of the evidence where the record was silent. *See, Parke* v. *Raley, supra,* at 37-39 (Blackmun, J. concurring); *Boykin* v. *Alabama, supra; Apprendi* v. *New Jersey, supra.*

4. The court erred in finding that petitioner was represented by counsel, or received effective assistance of counsel, at his 1958 plea in accordance with the Sixth Amendment.

a. The petitioner was not represented by counsel.

The petitioner was not represented by counsel at his 1958 plea hearing. The Rhode Island Supreme Court's finding that "during testimony petitioner admitted to having been represented by counsel during the plea hearing" is simply not true.[13] Instead, it represents a tortured reading of petitioner's testimony. The petitioner never testified that he was represented by a lawyer. Rather, the petitioner testified that he never hired a lawyer, that the court never advised him that it had appointed a lawyer to represent him, and that he never spoke to any lawyer between his arraignment and when he was sentenced on the robbery charge (A. 38a-42a, 51a). The petitioner acknowl-

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[13] Although footnote 5 of the court's opinion is confusing, it would appear that the court relied in part on a "presumption of regularity" in finding that petitioner was represented by counsel. Since the plea was given in 1958, five years before *Gideon* v. *Wainwright* was decided, no presumption that petitioner was afforded the right to counsel would apply. No such presumption is proper in any event. *See, Burgett* v. *Texas, supra,* at 114-15.

edged that there was a lawyer in the courtroom when he appeared in Superior Court on December 12, 1958, whom petitioner never met previously, never spoke to, and never saw again (A. 40a-42a), and that there were "a couple of guys" standing next to him at his appearance on January 12, 1959 (A. 43a). None of these individuals ever identified themselves to the petitioner or to the court as attorneys representing the petitioner, however. In fact, there was no evidence that anyone purported to actually "represent" the petitioner on either occasion of his appearances in Superior Court.

This evidence was uncontroverted. The State offered no evidence that the petitioner was represented by counsel or that he waived his right to counsel. The record is silent in this regard, and waiver cannot be presumed from a silent record. *See, Carnley* v. *Cochran*, 369 U.S. 506 (1962). Moreover, at that time petitioner's federal right to counsel had not yet been recognized as applicable to the states. Thus it is reasonable to presume that the petitioner did not waive a right he did not yet possess. *See, Parke* v. *Raley*, 506 U.S. 20, 31 (1992).

In these circumstances, where the conviction at issue occurred before *Gideon* v. *Wainwright*, 372 U.S. 355 (1963), and where the record does not show that petitioner was represented by, or that he waived his right to counsel, the petitioner's conviction is presumptively void. *Burgett* v. *Texas*, 389 U.S. 109 (1967). The burden was on the State to prove the validity of the conviction, and as the State offered no evidence to rebut the presumption of invalidity, the plea must be vacated.

b. The petitioner did not receive effective assistance of counsel as required by the Sixth Amendment.

Even accepting the court's erroneous finding that petitioner was represented by counsel at the 1958

hearing, it is readily apparent that petitioner did not receive effective assistance of counsel as guaranteed by the Sixth Amendment. In view of the uncontroverted evidence that no attorney explained to the petitioner what "nolo contendere" meant or that petitioner was pleading guilty, never advised him what the criminal charge was that was brought against him or the facts of the case, never advised him of the elements of the crime of robbery, never advised him of the effect or consequences of his plea, never advised him that by pleading guilty he was waiving certain constitutional rights, and in fact, never spoke to the petitioner at all, it cannot seriously be contended that petitioner received effective assistance of counsel.[14] "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland* v. *Washington, supra,* at 685.

A defendant whose attorney's "assistance" is as woefully inadequate as here is no better off than one who has been denied counsel altogether. In the circumstances of this case, where the evidence demonstrates unequivocally that petitioner did not receive "effective" assistance of counsel, or any assistance of counsel for that matter, and where the record is silent and thus no factual basis for the plea is shown, prejudice must be presumed. *Strickland* v. *Washington, supra,* at 692. When these circumstances are considered with the petitioner's unchallenged testimony that he was innocent of the offense with which he was charged, prejudice was, in any event, clearly established. Finally, it cannot be said that a plea under these circumstances could be voluntary and intelligent, and thus, petitioner submits, prejudice is irrele-

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[14] The court's statement that "Ouimette utterly failed to introduce any evidence that his counsel was ineffective, nor has he established that counsel's performance was so deficient as to amount to a denial of counsel", is ludicrous in the face of this testimony.

vant. *United States* v. *Tucker*, 404 U.S. 443, 447 n.5 (1972).

1976 Plea.

On September 15, 1976, the petitioner entered a plea of *nolo contendere* in the Superior Court to charges of assault with a dangerous weapon and conspiracy to commit assault with a dangerous weapon. The Superior Court sentenced the petitioner to three years, suspended, and four years of probation.

The 1976 plea of *nolo contendere* was not voluntarily and intelligently made with an understanding of the charges, and no factual basis existed for the plea.

A. The Petitioner's 1976 Plea Was Improperly Used To Enhance Petitioner's Sentence Because It Was Not Voluntarily And Intelligently Made With An Understanding Of The Nature Of The Charges, And Because No Factual Basis Existed For The Plea.

1. Factual background.

On September 15, 1976, the petitioner appeared before a justice of the Superior Court and entered pleas of *nolo contendere* to charges of assault with a dangerous weapon and conspiracy. During the colloquy with the court, the prosecutor was asked to describe the evidence that he was prepared to produce in support of the charged offenses. He initially pointed out that his decision to amend the charge was based in part on the victims' complete absence of any willingness to cooperate with the investigation into the matter and refusal to be witnesses. The description that followed described conduct by other inmates charged as co-defendants. The prosecutor specifically stated "[A]t no time did any witnesses observe this defendant actually have physical contact with the two victims." (A. 77a). He also made no reference to any evidence that would have established any conspirato-

rial agreement between the petitioner and these other men to engage in the assault as charged, or any evidence establishing the petitioner's culpability as a principal other than his mere presence at the scene and motive (A. 77a-77a).

Subsequently addressing the petitioner, the court did not recite the elements of the charged offenses or attempt to explain same, nor did the court interrogate the petitioner as to any of the elements. Instead, the court created its own version of events which inculpated the petitioner, acknowledging that the prosecutor had not stated anything about any agreement between the petitioner and the other inmates that would have established his involvement in a conspiracy to engage in the assault, or the petitioner's responsibility as a principal (A. 78a). The court then asked the petitioner if that was pretty much the way it happened. The petitioner responded in the negative, stating, "Well no, actually I went over there to bang him in the mouth, but it didn't work out that way." (A. 78a). Obviously frustrated with the petitioner's failure to accept the factual basis, the court then said:

> Well you realize by tendering this affidavit that you're admitting it happened that way and that it got out of hand, that you encouraged your friends to go out there and help administer this beating and that you agreed to go out there and give him a beating. The fact that it got out of hand is besides the fact. That's what the effect of your asking me to accept the *nolo* plea means, do you understand that?

(A. 78a-79a). The petitioner agreed that that would be the effect of the affidavit. He never agreed, however, to those facts which the court developed on its own to satisfy the factual basis requirement.

In subsequently explaining the basis for his sentence recommendation, the prosecutor again alluded to the factual basis for the plea and said the following significant things:

1) We have no witnesses who can put Mr. Ouimette in direct physical contact with any of the victims.
2) Beyond [defendant's presence], and the fact that we have a motive for the attack, we have very little other evidence against this man.
3) If we had gone to trial it is the considered opinion of myself and the police officers who worked on this case that there would be a very good likelihood that this man would be found guilty of some charge. However, there was a very good chance that he would be found guilty of a charge, only a misdemeanor, a lesser included offense . . .

(A. 81a-82a). Once again, the prosecutor referred to no evidence that would have established the petitioner's participation in any conspiracy, and acknowledged the absence of any evidence establishing petitioner's guilt as a principal other than mere presence and motive.

Following that turn of events, petitioner's counsel then described his understanding of the facts:

> There was no conspiracy in the sense of a plotted plan, scheme and contrived, planning and meeting of the minds of four inmates . . . There certainly was an abundant time for that two-minute walk around the - - - to have the elements of conspiracy met . . . But my client wants to represent to the Court that during that period, although there may have been a mutual intent to go there and use some force on Mr. Meo, not deadly force, but some force on Mr. Meo, they did not capitulate or sit down and plan a cold-blooded brutal beating. Once they did get to that area Mr. Ouimette, as the evidence - - - the state themselves would show - - - did nothing to actively partake in abusing either of those two individuals . . . .

(A. 84a-85a). Defense counsel's summation also contained no reference to facts demonstrating petitioner's guilt as a conspirator or as a principal.

2. The 1976 plea was not made voluntarily and intelligently with an understanding of the nature of the charge.

The judge who presided over the 1976 plea hearing later acknowledged that he did not recite the elements of the offenses charged nor did he interrogate the petitioner as to each element. (A 93a-94a). *See, United States* v. *Wetterlin*, 583 F.2d 346, 350-51 (7th Cir. 1978)(conspiracy is not a self-explanatory legal term or so simple in meaning that it can be expected or assumed that a lay person understands it); *United States* v. *Longoria*, 113 F.3d 975, 977 (9th Cir. 1997). Petitioner's counsel never represented that he had explained the elements of the charged offenses to the petitioner, and the petitioner repudiated the factual scenario that was proposed by the judge. In these circumstances, it cannot be said with any degree of assurance that the petitioner received "real notice of the true nature of the charge against him." *Henderson* v. *Morgan*, 426 U.S. 637, 644-45 (1976), quoting *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941). Thus, the petitioner's plea was invalid because it was not made voluntarily with an understanding of the nature of the charges. *McCarthy* v. *United States, supra*, 394 U.S. 459. Accordingly, it was improperly used to enhance petitioner's sentence.

3. No factual basis existed for the plea.

It is well settled in Rhode Island that Superior Court Rule 11 requires that a factual basis for each essential element of the crime be shown. *State* v. *Feng*, 421 A.2d 1258, 1269 (R.I. 1980); *State* v. *Williams*, 122 R.I. 32, 37, 404 A.2d 814 (1979); *Johnson* v. *Mullen*, 120 R.I. 701, 390 A.2d 909 (1978). *See also, Santobello* v. *New York*, 404 U.S. 257 (1971).

In neither the prosecutor's recitation, nor defense counsel's version of the events, is reference made to sufficient evidence demonstrating that the petitioner was part of a conspiracy or that he participated in the assault. *United States* v. *Wetterlin, supra,* at 351-352; *United States* v. *Tucker,* 425 F.2d 624 (4th Cir. 1970)(generalized admissions or statements by defendant's counsel do not meet Rule 11's requirement that the court be satisfied that there is a factual basis for the plea). The court's creation of facts to satisfy Rule 11's factual basis requirement was improper because it was not supported by the evidence as demonstrated by the prosecutor's description of the evidence that he was prepared to produce. *United States* v. *Wetterlin, supra,* at 353 n.10, citing *McCarthy* v. *United States, supra,* at 465. More importantly, the court's hypothetical scenario was rejected by the petitioner. As no factual basis existed for the petitioner's 1976 plea, it was invalid and improperly used to enhance petitioner's sentence.

IV. THE FEDERAL THREE STRIKES STATUTE, 18 U.S.C. §3559(c), IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THE INSTANT CASE BECAUSE IT SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE CONVICTIONS USED TO ENHANCE HIS SENTENCE WERE NONQUALIFYING FELONIES UNDER THE STATUTE.

The sentencing judge found that the offense of conviction in this case was a qualifying felony under the federal three strikes statute, 18 U.S.C. §3559(c), and that petitioner had been convicted on separate prior occasions of two or more qualifying felonies. In this regard, the judge did not require the government to prove the aggravating facts necessary to establish that the offense of conviction and the prior offenses constituted "serious violent felonies" within the meaning of

the statute, or even that the petitioner had committed the prior offenses. No evidentiary burden was placed on the government at all.

The three strikes statute contains a disqualification provision with respect to certain otherwise qualifying convictions that states as follows:

> (3) Nonqualifying felonies.
>
> (A) Robbery in certain cases. Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that —
>
> (i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and
>
> (ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

18 U.S.C. §3559(c)(3)(A). The judge acknowledged that under the statute, the 1958 robbery would not be considered a qualifying felony if the petitioner established by clear and convincing evidence that there was no use or threat of use of a firearm or other dangerous weapon (A. 25a).[15] Relying simply on the presentence report, however, the judge found the 1958 robbery and the 1976 assault to be qualifying felonies.

Petitioner submits that the burden of proof portion of §3559(c)(3)(A) violates due process by shifting the burden to petitioner to prove that his 1958 and 1976 pleas were nonqualifying felonies under the statute. As set forth hereinabove, the aggravating facts found by the judge were elements of a separate, aggravated offense. Due process requires that the government

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[15] The petitioner's 1976 assault plea also would not have constituted a strike under the statute if the petitioner proved by clear and convincing evidence that it was a nonqualifying felony.

bear the burden of proving all elements of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). To have required the petitioner to negate by clear and convincing evidence elements of the separate aggravated offense for which he was sentenced to life imprisonment, while the government bore no burden of proof at all, was a violation petitioner's right to due process. The error is pronounced when considered with the fact that both the sentencing judge and the First Circuit ruled that petitioner could not collaterally challenge his state court convictions at his federal sentencing proceeding. [*See*, footnote 4, *supra.*] Accordingly, petitioner requests that this Court rule that it was constitutionally impermissible to place the burden on the petitioner to negate by "clear and convincing evidence" the elements of the separate, aggravated offense for which he stands sentenced to life imprisonment.

Furthermore, petitioner submits that it was fundamentally unfair to sentence him to life imprisonment based on two convictions, one from 1958 and the other from 1976, that were obtained in violation of petitioner's constitutional rights as hereinbefore set forth. Neither of those convictions should have been allowed to be used to enhance petitioner's sentence. *See, Cooper* v. *Oklahoma*, 517 U.S. 348 (1996).

CONCLUSION

Based on the aforementioned arguments and authorities, petitioner respectfully requests that this Court review this case by writ of certiorari.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 01-2066

GERARD T. OUIMETTE,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Boudin, Chief Judge,
Torruella and Lipez, Circuit Judges.

JUDGMENT

Entered: February 21, 2002

Petitioner's application for a certificate of appealability is denied essentially for the reasons stated in the district court's Order of June 21, 2001, and the appeal is terminated. We add only the following observations.

1. Even assuming that retroactivity is not a bar in this instance, we squarely rejected petitioner's

Apprendi-related arguments in United States v. Gomez-Estrada, 273 F.3d 400 (1st Cir. 2001).

2. Even assuming, contrary to its plain language, that 18 U.S.C. § 3559(c)(4) incorporates all of the procedural safeguards of the Controlled Substances Act, 21 U.S.C. § 851, petitioner's 1958 and 1976 convictions fall outside the five-year limitations period of § 851(e). His statutory argument therefore fails.

3. Because petitioner has three prior convictions, at least two of which were counseled, he would have had the requisite "three strikes" at sentencing even had he made a collateral challenge to the maximum extent allowed by Custis v. United States, 511 U.S. 485 (1994).

4. Even assuming that the district court should have considered petitioner's two supplemental claims, petitioner fails to make a substantial showing of the denial of a constitutional right. The DeLuca, Jr., tape does not negate the evidence that one day after the Satin Doll incident, well within the time period charged in the indictment, "Ouimette instructed Gellerman to collect the $5,000 fine from Duxbury." United States v. DeLuca, 137 F.3d 24, 30 (1st Cir. 1998), cert. denied, 525 U.S. 917 (1998). The convictions relating to the Duxbury extortion would stand whether or not petitioner initiated the $5,000 demand. As for the Dumont tape, Ms. Dumont did not identify any testimony -- let alone perjured testimony -- concerning the petitioner that she may have given under coercion. in fact, she allegedly testified that she "didn't know nothin' when [she] got up on the stand."' This is consistent with her trial testimony that she did not positively identify the petitioner in the basement of the Satin Doll. Moreover, "[t]he Satin Doll incident, lasting about ten minutes, was witnessed in part by three Satin Doll

dancers," DeLuca, 137 F.3d at 30 (emphasis added), one of them Ms. Dumont.

5. Even on direct examination, "[i]t is not error to inform a jury of the contents of a plea agreement." United States v. Dockray, 943 F.2d 152. 156 (lst Cir. 1991) (citing United States v. Munson, 819 F.2d 337, 344-45 (1st Cir. 1987)). The prosecutor, however, referred to the district court as the "final arbiter" of the witness's truthfulness. We nonetheless find no prejudice to the petitioner because the defense's cross examination clarified the special circumstances under which the court may have occasion to assess the witness's credibility.

6. Given the weight of the evidence against the petitioner, including his videotaped demand for $50,000 and his recorded threat that, if Paul Calenda failed to make a payment by Monday, "maybe [by] Tuesday he's going to get a shot," DeLuca, 137 F.3d at 29, we are not persuaded that prejudice resulted from counsel's alleged failure to allow petitioner to testify to his reasons for being "outrage[d]" at Calenda during certain of his recorded conversations.

By the Court:
Richard Cushing Donovan, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk.

CertifiedCopies: **JudgeErnestoTorres**
David DiMarzio, Clerk

CC: **Gerard T. Ouimette**
Russell R. Weddell
James H. Leavey, Esq.
Donald C. Lockhart, Esq.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GERARD OUIMETTE

v. CA No. 99-489-T

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ernest C. Torres, Chief Judge.

Gerard Ouimette has filed a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. For the reasons that follow, the motion is denied.

Background

A jury found Ouimette guilty of one count of conspiracy to collect extensions of credit by extortionate means, a violation of 18 U.S.C. § 894, and two counts of aiding and abetting the collection of extensions of credit by extortionate means, violations of 18 U.S.C. §§ 2 and 894. On each of the three counts, Ouimette was sentenced to concurrent terms of life imprisonment without parole pursuant to the "three strikes" provision of 18 U.S.C. § 3559(c)(1)(A). Following denial of his direct appeal and his petition for certiorari, United States v. DeLuca, 137 F.3d 24 (1st Cir.), cert. denied, 525 U.S. 917 (1998), Ouimette filed the instant § 2255 motion.

Although Ouimette's motion was not received by the Court until more than one year after the Supreme Court denied certiorari, the government, apparently does not dispute that the motion was deposited in the

prison mail system within the one-year limitation period specified by § 2255 and; therefore, was timely filed. See Morales-Rivera v. United States, 184 F.3d 109 (1st Cir. 1999) (motions pursuant to 28 U.S.C. § 2254 and 2255 considered filed when deposited in prison's mail system).

In his motion, Ouimette makes numerous claims as to why his sentence should be vacated. Many of those claims do not rise to the level of constitutional violations or other violations that would be cognizable under § 2255. The claims may be grouped into six categories:

1. Insufficiency of the indictment
2. Prosecutorial misconduct
3. Witness issues
4. Erroneous jury instructions
5. Sentencing errors
6. Ineffective assistance of counsel.

The first five claims will be referred to collectively as the claims of "trial errors."

Several weeks after his motion was filed and after the one-year limitation period set forth in § 2255 had expired, Ouimette sought to "supplement" his § 2255 motion by adding claims (the "supplemental claims") that James "Slugger" Gellerman, a government witness, testified falsely at trial; and that Bobby Jo Dumont, another government witness, was coerced by the government into giving false testimony before the grand jury.

Discussion

I. The "Supplemental Claims"

Since Ouimette's supplemental claims, in effect, sought to amend his § 2255 motion, they are governed by Rule 15 of the Federal Rules of Civil Procedure. United States v. Barrett, 178 F.3d 34, 46 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000). Accord, United States v. Thomas, 221 F.3d 430 (3rd Cir. 2000). Thus, whether those claims are time barred turns on whether they "relate back" to the date on which Ouimette's § 2255 motion was filed.

The "relation back" of amendments to pleading is governed by R. 15(c) which provides:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law 'that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading
>
> * * *

Since subsection (c) (1) does not apply to § 2255 motions, Davenport v. United States, 217 F.3d 1341, 1344 n.7 (11th Cir. 2000), cert. denied, ___ U.S. 121 S.Ct. 1232 (2001) , the issue, in this case, is whether Ouimette's supplemental claims arise out of the "conduct, transaction or occurrence" set forth in

his original motion. An amendment to a § 2255 motion does not relate back" if it "add[s] new claims or . . . insert[s] a new theory into the case." Thomas, 221 F.3d at 431. In order to "relate back," an "untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial and sentencing proceedings." Davenport, 217 F.3d at 1344. Accord, United States v. Pittman, 209 F.3d 314 (4th Cir. 2000); United States v. Duffus, 174 F.3d 333 (3rd Cir.), cert. denied, 528 U.S. 866 (1999); United States v. Craycraft, 167 F.3d 451 (8th Cir. 1999). Otherwise, amendments "would be tantamount to judicial rescission of [§ 2255's] statute of limitations period." United States v. Esipinoza-Saenz, 233 F.3d 501, 505 (10th Cir. 2000) (citing Pittman, 209 F.3d at 318).

Neither of Ouimette's two supplemental claims arise out of the same "conduct, transaction or occurrence" as the claims made in his initial § 2255 motion. Both supplemental claims do more than simply clarify or amplify the claims contained in the initial § 2255 motion. They present new claims that are distinct from and unrelated to the original claims. Thus, the supplemental claims are barred by the one-year statute of limitations imposed by § 2255.

II. The Original Claims

Since the claims of "trial error" were not raised on appeal, Ouimette is procedurally barred from making those claims, now, unless he establishes either "cause" excusing that failure and "prejudice" resulting from it; or, alternatively, that he is "actually innocent." E.g., Brache v. United States, 165 F.3d 99, 109 (1st Cir. 1999) (quoting Murray v. Carrier, 477 U.S. 478, 485, 496 (1986)).

The ineffective assistance claims are not procedurally barred because, ordinarily, such claims cannot be raised on appeal. Knight v. United States, 37 F. 3d 769, 774 (1st Cir. 1994). In order to prevail on an ineffective assistance claim, a defendant must establish: (1) that the attorney's representation fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

A. Adequacy of Representation

In this case, the two classes of claims overlap because Ouimette's 'cause" for not raising his "trial error" claims on appeal appears to rest on the suggestion such failure was attributable to counsels' deficient performance.

A petitioner bears the burden of identifying the specific acts or omissions that constitute counsels' allegedly deficient performance. See Lema v. United States, 987 F.2d 48, 51-52 (1st Cir. 1993). See also Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992). It is not enough to present bald assertions or unsupported conclusions. See David v. United States, 134 F. 3d 470, 477 (1st Cir. 1998).

The adequacy of counsel's performance is evaluated "in light of the circumstances as they existed at the time of trial." Strickland, 466 U.S. at 689. The standard applied is a highly deferential one. "[The] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'." Id. (quoting Michael v. Louisiana, 350 U.S. 91 (1955)). The

attorney's judgment need not be right so long as it is reasonable. United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993).

B. The Alleged "Trial Errors"

Obviously, counsel cannot be branded deficient for failure to pursue claims that lack merit. See United States v. Cronic, 466 U.S. 648, 656 n.19 (1984) (right to effective assistance of counsel does not require the "useless charade" of presenting a meritless defense.) Therefore, in determining whether Ouimette's failure to raise his "trial error" claims on appeal is excused by counsels' allegedly substandard performance, the threshold question is whether there is any merit to those claims. In each case, the answer is no. Therefore, Ouimette has not satisfied even the first prong of the Strickland test.

(1) Sufficiency of the Indictment

Ouimette claims that the indictment was deficient in two respects. First, he argues that Count I, which charged conspiracy to collect extensions of credit by extortionate means, did not provide sufficient notice of the crime charged and that Counts III and V, each of which charged collection or attempted collection of extensions of credit by extortionate means, failed to adequately recite the facts underlying those charges. Second, Ouimette argues that Counts III and V failed to apprise him that he, also, was charged with aiding and abetting the offenses described in those counts.

An indictment satisfies an accused's right to be informed of the nature of the accusation against him if it recites sufficient fact and describes the offense charged with enough particularity that the accused is able to prepare a defense. United States v. Serino,

835 F.2d 924, 929 (1st Cir. 1987) (quoting Hamling.v. United States, 418 U.S. 87, 117 (1974)).

In this case, the indictment easily passes that test. Ouimette's claim of inadequate notice, apparently, is based on the redacted version of the indictment that was provided to the jury for its use during deliberations and not on the actual indictment. In order to avoid any unfair prejudice to the defendants, the redacted indictment omitted approximately 1 ½ pages of overt acts that were alleged in the actual indictment. Those allegations were more than enough to inform Ouimette of the charges against him and the basis for them. The same is true with respect to the aiding and abetting charges contained in Counts III and V. Those counts expressly allege violations of 18 U.S.C. § 2 which defines the offense of aiding and abetting. That explicit reference was enough to apprise Ouimette that he had been charged with aiding and abetting. Indeed, "aiding and abetting is an alternative charge in every count, whether explicit or implicit." United States v. Oreto, 37 F. 3d 739, 751 (1st Cir. 1994).

Since there is no merit to Ouimette's claims that the indictment was flawed, counsels' failure to raise those claims at trial or on appeal was not objectively unreasonable. See United States v. Cronic, supra.

(2) Prosecutorial Misconduct

Ouimette cites what he claims were several instances of prosecutorial misconduct during his trial. These claims require little discussion because they rest, almost entirely, on inaccurate or unsupported assertions.

For example, Ouimette claims that the prosecutor improperly vouched for the credibility of James Gellerman, a key government witness, by giving the impression to the jury that the Court and government were guaranteeing the truthfulness of Gellerman's testimony. That claim is based on the presentation of evidence regarding a plea agreement under which the government promised to recommend a more lenient sentence in exchange for truthful testimony by Gellerman. The mere fact that the plea agreement was admitted into evidence and that testimony was elicited establishing Gellerman's understanding of the requirement that he testify truthfully did not amount to impermissible vouching. "It is not error to inform a jury of the contents of a plea agreement, nor is it improper for the government to call attention to a witness' motivation for testifying." United States v. Dockray, 943 F.2d 152, 156 (1st Cir. 1991) (citing United States v. Sutherland, 929 F.2d 765, 775-76 (1st Cir. 1991)); United States v. Munson, 819 F.2d 337, 344-45 (1st Cir. 1987); and, United States v. Martin, 815 F.2d 818, 821-23 (1st Cir. 1987)).

Ouimette also claims that the government failed to disclose a cooperation agreement that it had with Paul Calenda, one of the extortion victims, that would have required Calenda to testify at trial. The government denies that any such agreement existed and Ouimette has failed to proffer any evidence that such an agreement existed.

Finally, Ouimette claims that the government failed to correct what it knew to be false testimony by Paula Coppola, another government witness, regarding several matters unrelated to the charges against Ouimette. Once again, Ouimette has not established, or even presented any evidence, that Coppola's testimony was false or that the government knew it. Indeed, at trial, Ouimette had ample

opportunity to challenge Coppola's testimony and, in his memorandum, Ouimette acknowledges that his trial counsel did a very effective job of attacking Coppola's credibility.

(3) Prejudicial Comments

Next, Ouimette claims that he was denied his due process right to a fair trial because he was unfairly prejudiced by comments made by Coppola and by the government's failure to call Robert Buehne as a witness after the prosecutor had referred to Buehne in his opening statement.

Coppola's comments consisted of references to a brief liaison she had with Ouimette "after he got out of jail"; an unsuccessful attempt to telephone him the following June "after he went back to jail" and a statement that a late night visit by Ouimette shortly after her husband's death caused her to fear for her safety.

The comments were nothing more than passing references made by Coppola in an effort to fix the time at which certain events occurred. Once those comments were made, counsel was confronted with a difficult tactical decision. Since it is unlikely that those comments would have warranted a mistrial, counsel had two choices. He could move to strike the statements and ask for a cautionary instruction thereby running the risk of calling undue attention to the comments.[1] Alternatively, he could "let sleeping dogs lie" and focus the jury's attention on the issues on the case. Under the circumstances, it cannot be said that counsel's decision was an unreasonable one.

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[1] During the charge conference, the Court inquired as to whether the defense sought an instruction on the subject. Defense counsel stated that he did not. Tr. (10/24/95) at 28-29.

In any event, given the weight of the other evidence against Ouimette, it is difficult to see how Ouimette was prejudiced by counsel's decision.

It is even more difficult to see how Ouimette's counsel could be faulted for the government's failure to call Buehne as a witness. As already noted, Ouimette bears the burden of identifying the specific acts or omissions that constitute counsel's allegedly deficient performance. See Lema, supra. However, Ouimette has failed to explain what, if anything, he contends that counsel could have or should have done to force the government to call Buehne as its witness.

Nor has Ouimette demonstrated that he was prejudiced by the government's failure to call Buehne. There is no indication that Buehne's testimony would have been favorable to Ouimette and the limited references made in the government's opening statement to Buehne's involvement in the events underlying the charges against Ouimette were amply supported by the testimony of other witnesses.

If Ouimette's claim is that counsel should have pursued the matter by requesting a "missing witness" instruction, the answer is that counsel did so. However, this Court denied that request and the First Circuit affirmed on the ground that Buehne's testimony would have been merely cumulative. DeLuca, 137 F.3d at 38.

(4) Jury Instructions

Ouimette claims that the Court erred in instructing the jury that conviction on the extortion counts required proof that Ouimette had acted "knowingly and willfully" when the indictment alleged only that he acted "knowingly."

It is difficult to understand how Ouimette claims to have been prejudiced by the alleged error. If anything, instructing the jury that the government had to prove something more than what was required would have been advantageous to Ouimette. In any event, Ouimette appears to have confused the Court's charge on extortion with the charge on aiding and abetting.

Ouimette also claims that the Court erred in not providing the jury with a definition of "extortionate extension of credit" contained in 18 U.S.C. § 891(6). However, Ouimette was charged with a violation of § 894 and the term "extortionate extension of credit" is used to describe violations of § 892(a).

Since there is no merit to either of these claims, Ouimette's counsel cannot be deemed ineffective for failing to raise or pursue them. See Cronic, 466 U.S. at 656 n.19; Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999), cert. denied, 528 U.S. 1163 (2000).

(5) Sentencing Errors

Next, Ouimette claims that the Court erred in sentencing him to life in prison without the possibility of parole pursuant to 18 U.S.C. § 3559(c) because he did not have prior convictions for "two or more serious violent felonies." 18 U.S.C. § 3559(c)(1)(A)(i). Ouimette does not dispute that he had three prior convictions for robbery, conspiracy to commit murder and assault with an dangerous weapon. However, Ouimette argues that none of those offenses are "violent felonies;" and, even if they are, § 3559(c) is unconstitutional. Both arguments were made by Ouimette's counsel at the time of sentencing and rejected by this Court.

Ouimette also argues, for the first time, that two of the convictions resulted from guilty pleas that

the government failed to prove were voluntary and intelligent and that his counsel was ineffective for not challenging them on those grounds. That argument, too, fails because the Supreme Court has made it clear that the state court conviction cannot be collaterally attacked in a federal sentencing proceeding except on the ground that it was uncounseled. See Custis v. United States, 511 U.S. 485, 487 (1994). In fact, the Supreme Court has barred such challenges even in § 2255 proceedings. See Daniels v. United States, ___ U.S. ___, 121 S.Ct. 1578 (2001).

C. The Ineffective Assistance Claim.

Ouimette's "ineffective assistance" claim is based on counsel's failure to present or pursue the alleged "trial errors". Since the Court already has determined that counsel's performance with respect to those matters was not objectively unreasonable, this claim, too, fails.

Conclusion

For all of the foregoing reasons, Ouimette's motion to vacate, set aside or correct his sentence is denied.

IT IS SO ORDERED:

/s/ Ernest C. Torres
Ernest C. Torres
Chief Judge

Date: June 21, 2001

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* *		CRIMINAL ACTION
USA	*	NO. 95-029T
Government	*	
	*	THURSDAY,
VS.	*	FEBRUARY 1, 1996
	*	
GERARD OUIMETTE	*	
Defendant	*	
* *		Providence, RI

HEARD BEFORE THE HONORABLE ERNEST C. TORRES DISTRICT JUDGE
(SENTENCING)

A-P-P-E-A-R-A-N-C-E:

For the Government: James H. Leavey, Esquire
and
Kenneth P. Madden, Esquire

For the Defendant: Richard M. Egbert, Esquire
and
Louis F. Robbio, Esquire

Court Reporter: Judith L. Montie
215 Federal Building
Providence, RI,02903

[2] THURSDAY, FEBRUARY 1, 1996
SENTENCING

THE COURT: Good morning.

ALL: Good morning, Your Honor.

THE CLERK: The matter before the Court is criminal action 95-29, United States of America versus Gerard T. Ouimette.

THE COURT: Before we begin, I certainly would expect this proceeding will be concluded this morning but just in case it's my understanding, Mr. Egbert, you no longer have a problem this afternoon? I know you had a commitment this afternoon.

MR. EGBERT: That's correct.

THE COURT: All right. This matter is here for sentencing. Mr. Ouimette having previously been found guilty by a Jury of one count of conspiracy to collect extensions of credit by extortionate means and two counts of collection of extensions of credit by extortionate means.

Mr. Ouimette and Mr. Egbert, have you both had an opportunity to read the presentence report and to discuss it with each other?

MR. EGBERT: Yes, Your Honor.

THE COURT: Mr. Ouimette, is that [3] correct?

DEFENDANT OUIMETTE: Yes.

THE COURT: Now, based on my review of the presentence report it does not appear that there are any factual issues in dispute. I know counsel have raised a number of objections based on application of those facts to the guidelines. For example, whether Mr. Calenda received a body injury, whether Mr. Duxbury received a body injury, whether there was restraint used, what Mr. Ouimette's role in the offense was and whether they should be an upward departure based on under representation of criminal history but there did not appear to be any factual issues, is that correct?

MR. EGBERT: The factual issues were contested at trial, Your Honor. You heard them at trial.

THE COURT: Yes.

MR. EGBERT: A recontest of those issues at this time is not an issue it seem to me. They are in contest in the sense that Mr. Ouimette at all times had relied on his not guilty plea and has not admitted or agreed to any of those facts nor does he admit to them at this **[4]** juncture.

THE COURT: I was referring not so much to the prosecution version but as to the rest of the presentence report?

MR. EGBERT: That is correct.

THE COURT: It seems to me, counsel, and if you disagree you can explain to me why, that the first issue that ought to be addressed here is whether Section 3559, the so-called three strikes statute, mandates a life sentence in this case. If it does, then it would appear there is no reason to consider the guideline issues because the guidelines themselves and the case law as you know provide that a mandatory minimum sentence takes precedence over any penalty provided in the guidelines. Obviously, if the three strikes statute does not mandate a life sentence, then we would need to go through the guidelines calculations. Does anybody disagree with that?

MR. LEAVEY: The Government does not disagree with that.

MR. EGBERT: I think I disagree in this sense. And it's that this Court is not the final arbiter of whether or not 3559 applies and **[5]** the law is scant as we know on 3559. There being to my knowledge only one case that's come out of the Circuit Court of Appeals in both defining the statute and its history. So were this Court to find, for example, that 3559 applies and another Court, the Court of Appeals or the Supreme Court disagrees with this Court, then we

would have to undergo at that time a resentencing for which the Defendant quite frankly I think is entitled to have now. I think to leave it open would create both double jeopardy issues, double sentencing issues, continuous prosecution issues and the like. So I think this Court and I would ask this Court to resolve the sentencing issues that are extant in this case today so that there be a full and complete record of that for a single sentencing proceeding for which the Defendant is entitled under statute and rule. And if then, again, if all of that upon review is upheld and 3559 is upheld, if the Court so finds, that of course would be the precedent sentence. If we did the other, sentencing issues which would make up guideline questions and the like would be resolved.

THE COURT: The problem with that, **[6]** Mr. Egbert, that if the Court should find that 3559 applies, then the Court would be required, not only applies but if it requires a life sentence, then that would be the sentence the Court would impose and there would be no guidelines sentence and even if that determination was wrong and the Court made the guidelines calculations, there would be guidelines sentence. It would have to be remanded for sentencing anyway.

MR. EGBERT: The guidelines calculations would be made however and ruled on by the Court.

THE COURT: Only I suppose what the range would be.

MR. EGBERT: Well, we may be talking the same words in different language. The issue of base offense level, role issues and issues of aggravation or mitigation within the guidelines and all of objections that we have made to the presentence report would be resolved by the Court at a sentencing proceeding today and although you would issue a sentence, it seems to me, you would make your rulings on the sentencing issues and all that would be left would be, were **[7]** it to be remanded for example, and the Court

of Appeals would agree with this Court's sentencing ruling, all that would then occur is a sentence within the guideline range as finally established but all of those guidelines issues and all of those sentencing issues would have been acted upon and the Defendant would have had the right to appeal them if at all with his direct appeal in this case and not to rely on a subsequent overruling or interpretation of 3559 by an appellate Court causing a full resentencing but more than the resentencing a determination of guideline issues and the presentence report. I don't know whether they would be minimum mandatory or not in the case that the Court is permitted to avoid or abandon its obligations to determine the sentencing guidelines in the case.

And just for the record on behalf of Mr. Ouimette it is our position that you do so today and that any failure to do so would be prejudicial to him and cause him harm in the future.

THE COURT: Mr. Leavey, do you have anything to say on this?

MR. LEAVEY: Your Honor, I would **[8]** have no objection to what Mr. Egbert proposes but I do think it is a waste of the Court's time. if the Court were to find that life imprisonment applies, it goes to the First Circuit. If the First Circuit disagrees, it has got to come back here anyway. At that point the Court could make a determination then as to the base offense level, the appropriate sentence and the Defendant would still have his right to appeal those sentencing issues. I know of no right that he would have to have issues decided that don't have to be decided at this point.

THE COURT: It seems to me, Mr. Egbert, you haven't persuaded me that my original inclination wasn't correct. I don't know what would be accomplished by going through the guidelines calculations at this point. As you say, the Court would make determinations as to the applicable

guideline range at most. That is the most the Court could do now. If it finds that 3559 mandates a life sentence, then Mr. Ouimette would have to be sentenced under that section and he has a right to appeal his sentence. I don't know how he would appeal any interlocutory determinations the Court might have **[9]** made as to some of the guidelines calculations and even if that were the case, the case would have to come back for sentencing anyway under the guidelines. So I will start anyway with the 3559 issues and see where that takes us.

In that connection, I do want to acknowledge that I have received memos from counsel, both counsel in this case. I'll ask the Clerk to make those memos a part of the file at the conclusion of this proceeding. The memos were very helpful. I thank counsel for them.

Now, as far as the 3559 issues are concerned, it seems to me that the Defendant's objections fall into three categories. The first category is essentially whether Section 3559 applies in this case. That is to say whether the offenses of conviction in this case are serious violent felonies and whether the Defendant has been previously convicted of, at least, two other serious violent felonies. Three have been alleged in the information - conspiracy to murder, assault with a dangerous weapon and robbery. That first category it seems to me encompasses arguments five and six in the Defendant's memorandum.

[10] The second category of objections go to the constitutionality of section 3559. And that would include objections one, three, four, seven and eight in the Defendant's memorandum.

And the last category would include, would roughly I think be summarized as whether Section 3559, assuming that it applies and that it's constitutional, whether it requires a life sentence. And that would deal with objections two and nine in the Defendant's memorandum.

So I think the logical starting point is with the first category. Does Section 3559 apply here? Are the offense in question serious violent felonies within the meaning of that statute. As I say, I have read your memoranda. You don't need to repeat anything that's in the memoranda but if counsel would like to amplify on anything that you have said, I certainly would like to hear what you have to say. Mr. Egbert.

MR. EGBERT: Your Honor, I frankly, again, think our memorandum covers the issues. I have spoken with Mr. Robbio and Mr. **[11]** Ouimette, not to any advantage to repeat that what's already been stated in writing to the Court. Our positions are described there. I don't believe we have anything to add to them either factually or otherwise.

THE COURT: All right.

Mr. Leavey, what does the Government have to say on that?

MR. LEAVEY: Your Honor, the Government agrees with Mr. Egbert as to the procedure. We feel we have responded in the memorandum submitted to the Court and we have nothing to add.

THE COURT: All right. The statute Section 3559(c)(2) and (c)(3) are the relevant provisions here. (c)(2)(F)(i) or (c)(2)(F) defines serious violent felony. Subsection I enumerates a number of crimes that fall within that category and for present purposes the crimes enumerated include murder as described in Section 111 of the US Code or conspiracy to murder. Robbery as described in Section 2111, 2113, and 2118, and extortion. Subsection 2 of (F) provides that any other offense that is punishable by more than ten years **[12]** and either has as an element the use or attempted use or threatened use of physical force against the person of another or by its nature involves a substantial risk that physical force against a person of another may be used in the course of committing the offense would also qualify as serious violent felonies.

I guess I have to begin with the offenses of conviction. Because the statute says that the mandatory life sentence applies if a person is convicted of a serious violent felony and has been convicted on separate prior occasions of two or more serious violent felonies. So both the offense of conviction and at least two other offenses of which the Defendant was previously convicted must be serious violent felonies.

As to the offense of conviction or offenses of conviction, conspiracy to collect extensions of credit by extortionate means and collection of extensions of credit by extortionate means, if we look first of all to determine whether they are enumerated offenses under (F) sub one, there are certainly some questions raised. As I have indicated, the **[13]** offenses under subsection (F) are described both by generic name and reference to the Federal statute defining them and they are also offenses that are described only by generic name. The collection of an extension of credit by extortionate means is not included in the first category, nor is it included in the second category unless it is encompassed by the generic term extortion.

Now, in construing that statute what extortion means as used in the statute, whether it encompasses the offenses of conviction in this case, the Court has to give the term its commonly accepted meaning and furthermore in this case the statute expressly provides that a serious violent felony refers to the enumerated offenses by whatever designation. So the question is whether notwithstanding its title or designation, violations of Section 894 come within the ambit of the generic term extortion. It seems to me the answer to that question has to be yes. First of all, the offenses, at least, the substantive offenses in this case require proof that extortionate means were used to obtain something from another **[14]** person. And in essence that makes it equivalent to what is commonly known

as the crime of extortion; in other words, it's a form of extortion and it seems to me that it comes within the generic term extortion that's specifically enumerated in subsection I. But even if it doesn't, there is no question, I don't believe, that it does qualify as a serious violent felony under subsection II. It is punishable by more than ten years in prison. The statutory penalty is twenty years. And furthermore it has as an element the use, attempted use or threatened use of physical force against the person of another. In other words, conviction of the substantive extortion counts required proof that extortionate means were used and extortionate means are defined for purpose of that statute as the use or threatened use of violence to harm another person.

It also meets the alternative requirement of subsection II as a crime that by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense. Certainly, the collection of an extension of **[15]** credit by extortionate means by its nature involves such a risk simply because, as I have said, it is defined to include the use or the threatened use of violence or harm to another person. In fact in this case as the evidence indicated, it actual did involve the actual use of physical force against the person of another, both Mr. Calenda and Mr. Duxbury. So on either count, it seems to me that the offenses of conviction are serious violent felonies within the meaning of the statute.

The next question would be whether the Defendant was previously convicted of two or more other serious violent felonies. As I have stated, the three felonies that the Government relies on are conspiracy to murder, robbery, and assault with a dangerous weapon. Those were all offenses of which Mr. Ouimette was convicted in the State Court.

As far as the conspiracy to murder is concerned, murder and conspiracy to murder are

enumerated offenses. They are, specifically, enumerated under subsection (F) sub I. That is exactly what Mr. Ouimette was convicted of. Now, the conviction was in the **[16]** State Court but the statute, specifically, includes state offenses by whatever designation. There is no question that he was convicted in the State Court of a conspiracy to murder and under Rhode Island Law, that offense is punishable by life imprisonment. The definition under Rhode Island Law is essentially the same as the definition under the comparable Federal statute, Section 1111. So certainly that offense qualifies as a serious violent felony.

As to the robbery, again, robbery is one of the specifically enumerated offenses under subsection (F) sub I and, again, that is exactly what the Defendant was convicted of in the State Court as indicated in paragraph forty of the presentence report. The elements under State law are virtually identical to those under the Federal statutes referred to which define various kinds of robbery for Federal purposes. There is an escape provision that robbery may not be considered if the Defendant establishes by clear and convincing evidence that there was no use or threat of use of a firearm or other dangerous weapon but it is plain from the record here that a firearm was involved and there **[17]** has been no rebuttal of that. So I find that the robbery offense, which I should also note is punishable under State law by not less than ten years, would also qualify as a serious violent felony as a specifically enumerated offense.

In addition, like the conspiracy to murder it seems to me that the robbery would also qualify under the alternative definition under subsection II as an offense that has as an element the use or threatened use of physical force against the person of another. One of the elements of robbery is that there must be

some threat that enables the person to take whatever it is that is being taken and also because of that, robbery by its nature involves a substantial risk that physical force may be used in the course of committing the offense. So robbery certainly seems to me qualifies as a predicate offense.

It may be redundant, but the third offense relied on by the Government assault with a dangerous weapon certainly is not an enumerated offense. And therefore it is not a serious violent felony unless it meets the alternative definition under subsection II. **[18]** Once, again, it seems to me that this offense qualifies under that section. It has as an element the use or attempted use or threatened use of physical force against the person of another and that is the essence of assault with a dangerous weapon. It also qualifies under the alternative definition under subsection II as being an offense by its nature involves a substantial risk that physical force may be used against the person of another in the course of committing the offense. Furthermore under Rhode Island Law assault with a dangerous weapon is punishable by a term of not greater than twenty years. So it also meets the requirement that it is an offense punishable by the ten years or more.

So as far as the statutory arguments are concerned, I find that the statute does on its face, at least, apply in this situation. We then turn to the question of the constitutionality of the statute.

Mr. Egbert, do you have anything to add to what you have stated in your memorandum?

MR. EGBERT: No.

[19] (PAUSE)

MR. EGBERT: one moment.

(PAUSE)

MR. EGBERT: Once again, Your Honor, with the concurrence of both counsel and the Defendant, we have a written brief which outlines our objection to the constitutionality of the statute and rely on it.

THE COURT: All right.

Mr. Leavey, do you have anything to add?

MR. LEAVEY: No, Your Honor. The Government has nothing in addition to that put into the memo.

THE COURT: I will try my best to briefly summarize the constitutional arguments made by the Defendant as I understand them. The first is that the three strikes statute violates the Eighth Amendment; that is to say that it amounts to cruel and unusual punishment because the punishment is disproportionate to the punishment that would otherwise be imposed under the guidelines for the offense of extortion and I am using that as a shorthand term, for the offenses of which the Defendant has been convicted in this case.

[20] The response to that I think is pretty well set forth in the Government's memorandum and what little case law there is on the subject. Generally speaking, Congress has the prerogative of prescribing the level of Punishment to be imposed for crimes. That's the function of a legislative body to make a determination as to what penalty ought to be exacted for committing particular crimes. There may be very limited circumstances under which the penalty prescribed by the statute may be held to violate the Eighth Amendment and the only cases that really tend to support that seem to be in the area of capital punishment cases. Capital punishment is considered to be so distinguishable from incarceration of whatever duration that there have been isolated instances. I think one case that know of where the Court has said that there may be an Eighth Amendment problem in applying the statutorily prescribed penalty but this not one of those cases.

Certainly life in prison is a very severe sentence for extortion but as the Government has cited in its memorandum, there are a number of cases that have held that life sentences for even lesser offenses **[21]** do not run afoul of the Eighth Amendment. So I don't believe that this case rises to the level of an Eighth Amendment violation.

The next constitutional argument is that a life sentence here would violate the Fifth Amendment. That it constitutes double jeopardy because it would punish the Defendant again for prior convictions; in other words, it's more than a mere enhancement and it's, in effect, additional punishment for the previous convictions. The answer to that, again, has been provided by both the Supreme Court and by the Eighth Circuit in the Farmer case and it is that the Defendant is not being punished under the three strikes law for previous offenses. He would be punished for the offenses of conviction in this case. The previous offenses are simply taken into account in fixing the penalty in this case and the Courts including the Supreme Court have consistently rejected the contention that statutes providing enhanced penalties for recidivists expose Defendants to double jeopardy. So I reject that argument as well.

The next argument is an ex post facto argument. It is that application of **[22]** 3559 would violate Article one Section nine of the ex post facto clause because it retrospectively changes the consequences of the punishments imposed for past acts. As I have already indicated, the law does not impose a punishment for past acts or prior offenses. it enhances the penalty for the offense of conviction in this case. There is no ex post facto problem if it is analyzed in those terms because this offense was committed after the three strikes statute was enacted. The statute was adopted on September 13, 1994. The offenses in this case post date the enactment of that statute. I think there certainly would be a problem if

the three strikes statute had been adopted after the date of the offense in this case but it was not.

So therefore the Defendant was certainly on notice of the possibility of an enhanced penalty and had an opportunity to avoid the enhance penalty by refraining from committing another serious violent felony because the three strikes statute was enacted before these offenses were committed.

The next argument is that **[23]** application of the three strikes statute would deny the Defendant due process and under the Sixth and the Fourteenth Amendments or to put it another way that he would have deprived of effective assistance of counsel with respect to the prior offenses because he was not advised that the consequences of pleading guilty to those offense could expose him to a life sentence under the three strikes statute. In effect, it seems to me that what that argument is saying is that the right to effective assistance includes the right to be advised with respect to the possible impact that conviction might have on a sentence for a future crime that the Defendant might choose to commit if the legislature should later enact a statute providing for enhanced penalties for those future crimes and it seems to me that stretches the notion of effective assistance of counsel way beyond its limits. I don't think that there is any effective assistance of counsel issue implicated under these circumstances.

The last constitutional argument that the Defendant has raised is that the statute under which Mr. Ouimette was convicted in this case, Section 894 is itself **[24]** unconstitutional because the offense it describes does not have a substantial affect on interstate commerce and therefore, there is no Federal jurisdiction in this case. There is no authority cited for that proposition other than the I guess it was the Lopez case that dealt with the firearms around the schools. I think this is clearly distinguishable from the Lopez case because the legislative history of the

statute indicates that Congress found there to be a significant affect on interstate commerce that these so-called loan sharking activities had a significant impact on interstate commerce and that provides the necessary jurisdictional basis for the statute. So I reject that argument as well.

Now, there are two other arguments. I may have a little more difficulty fairly summarizing them but one is, as I understand it, is argument number two that a life sentence under the statute is discretionary, not mandatory and that seems to be based on the contention that the word shall as used in the statute really means may. That seems to me to be a very tortured reading of the plain language of **[25]** the statute. It seems to me the word shall clearly makes it mandatory if the statute is applicable.

The other argument is that the three strikes statute is inconsistent with the guidelines and the spirit of the guidelines and I think the short answer to that is that the statute supersedes the guidelines. There is ample case law and the guidelines themselves recognize the fact that in the case of a conflict between a mandatory minimum prescribed by the statute and the sentence that would otherwise be imposed under the guidelines, the mandatory minimum governs and certainly one can argue and I think probably in many cases with some merits, that these mandatory minimums may not be wise. In some cases one could argue they may not be fair but Congress certainly has the power to prescribe them and when Congress does so, they supersede the terms of the guidelines. So I reject that argument as well.

Is there anything further before we proceed to the allocution stage?

MR. LEAVEY: I don't believe so.

THE COURT: Mr. Egbert?

[26] MR. EGBERT: Not that I know of, Judge.

THE COURT: Mr. Ouimette, at this time, you have the right to address the Court and say anything

that you think ought to be taken in account in imposing sentence. Is there anything that you would like to say?

DEFENDANT OUIMETTE: Well, Your Honor, I am sure that whatever I say isn't going to change the outcome of account at this point but I just would like to say one thing. As long as in this country there is no other way to judge the truth except by what we hear from the stand and Mr. Leavey and his office continues to abuse their discretion which they have the discretion to give lie detector tests to whoever joins the witness protection program, that there are going to be abuses and as long as there are abuses, people like me are going to get hurt. That's all I've got to say.

Excuse me, one thing more. If he agrees to give Duxbury, Calenda, Buehne, Paula Coppola, and Gellerman a lie detector test, any one of them passes, I'll drop my appeal. One, just one.

[27] THE COURT: Mr. Egbert, do you have anything to say on behalf of Mr. Ouimette?

MR. EGBERT: Your Honor, I have only things to say in the event the Court doesn't determine that this is a statutorily required mandatory sentence. Now, that you've apparently made your rulings in that regard, I am not prone to waste any air and to argue on Mr. Ouimette's behalf if the Court has determined the sentence, as you have, that must be imposed in this case is the mandatory life sentence.

I could go on at great length as many of colleagues have and did before Congress as to the efficacy of the statute which blindly permits these kinds of impositions of sentence and permits the United States Government through its prosecutors' office to be determinator of who, when and where gets those sentences and to use a statute such as this to use as a club or bludgeon to extract testimony much of which I am afraid will end up being lies from witnesses or Defendants who are faced with life if they choose to file it or not.

So those are all arguments and messages which I am hopeful as this process **[28]** goes will lead Congress to make some sense out this kind of sentencing scheme but if you ruled, as you have, that your sentence is required by Congress then our only place to go is the Court of Appeals and the Supreme Court. To say something on his behalf to you after such a ruling is in fact wasting air which I am not likely to do.

THE COURT: All right.

Mr. Leavey, do you have anything to say?

MR. LEAVEY: No, Your Honor. I believe that the Court has indicated it has no discretion. We feel even if the Court did have discretion life imprisonment would be an appropriate sentence in this case.

(PAUSE)

THE COURT: All right. Mr. Ouimette, would you stand up please while the court imposes sentence.

As you recognize, Mr. Ouimette, there is no suspense left here. The Court has ruled that the statute applies and the statute requires a life sentence and therefore I hereby commit you to the custody of the Bureau of Prisons on the counts of conviction, one, three **[29]** and four for a period of life without parole. Those sentences to be served concurrently with one another.

I am not going to impose any fine on any of those counts because it appears from the presentence report that you don't have any assets with which to pay a fine. I am required to impose a special assessment on each count in the amount of fifty dollars.

You may be seated, Mr. Ouimette, and again as I am sure you know, you have the right to appeal your conviction and the Court's sentence. If you cannot afford the cost of an appeal, you may petition the Court to apply for permission to appeal without

payment of costs. If you do wish to appeal, as I am sure you know, Mr. Egbert has probable told you, you must file your appeal within ten days or you might be considered to have forfeited your right to appeal. So those are things you can discuss with Mr. Egbert following the conclusion of this proceeding.

Do you have anything further, .Mr. Leavey?

MR. LEAVEY: I don't believe so.

[30] THE COURT: Mr. Egbert, do you have anything further?

Court will be adjourned.

APPENDIX D

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

STATE OF RHODE ISLAND

VS. 75-1436

GERARD T. OUIMETTE

HEARD BEFORE
THE HONORABLE JUSTICE PFEIFFER
MARCH 16, 1999

APPEARANCES:

STEPHEN REGINE, ESQ.
SPECIAL ASSISTANT ATTORNEY GENERAL
FOR THE STATE

JOHN F. CICILLINE, ESQ.
FOR THE DEFENDANT

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. . . we could, please.

[2] MR. CICILLINE: If I could identify for the record that PM 98-4646 involves a 1958 plea on indictment 29046. Application for post-conviction relief was filed in that case September 14, 1998. I'm sorry. In 75-1436 there was a motion to vacate filed on February 18, 1991. In November of 1998 the defendant moved to amend the motion to vacate to a petition for post-conviction relief. So there are two post-conviction reliefs on the seventy-five application. There is a transcript of September 15, 1976. It is the defendant's position the transcript supplements the record for the purpose of that post-conviction relief application. On the 1958 case testimony is necessary.

THE COURT: Okay. Then turning to the PM 98-4646 case why don't we proceed with that. Can we have the transcript marked as it relates to the other case once we have concluded this testimony?

MR. CICILLINE: The transcript is appended to the application.

THE COURT: The State has no objection to the authenticity of the being considered with respect to that second application as recited by Mr. Cicilline?

MR. FOWLER: I haven't seen it, Your Honor, but I assume it's the same transcript that I have.

MR. CICILLINE: It's the hearing before Judge Needham.

[3] MR. FOWLER: The hearing before Justice Needham on September 15, 1976, I have no objection to that.

THE COURT: Okay. Thank you. Mr. Cicilline, you wish to have testimony presented by the defendant.

MR. CICILLINE: Yes, Your Honor.

G E R A R D T. O U I M E T T E, after having been duly sworn testified as follows:

DIRECT EXAMINATION BY MR. CICILLINE:

Q Mr. Ouimette, where were you born?
A Providence, Rhode Island.
Q And in what year?
A 1940.
Q And who did you live with during your young life?
A Please.
Q Who was your family during your young life?
A Providence.
Q What was your family? What constituted your family?
A My mother, father, sisters and brothers.
Q And did your father live with you throughout your life? When did your father die?
A 1948. I believe I was eight years old.
Q Okay. And do you recall what your father's employment was? **[4]**
A He drove somebody.
Q Truck driver?
A No, I think cars. He drove for some politician and then he drove cabs.
Q During 1940 on, 1958, October of 1958, what was your education?
A I didn't like school so it couldn't have been much. Seventh, eighth grade, whatever. I didn't get along in school well.
Q So you had no education beyond the seventh or eighth grade?
A Not really.
Q Okay. Between 1940 and October of 1958 were you employed?
A Yeah. I worked at Loutitt laundry for a while. That was between '57 and '58.

Q Between 1940 and October of 1958 had you been to the juvenile court?
A Yeah, a few times.
Q And had you ever been charged with a crime of robbery?
A No.
Q No?
A Never.
Q Prior to October of 1958 did you take any classes in the juvenile justice system, formal educational class?
A Prior to 1958?
Q Yes. **[5]**
A No.
Q Had you ever been to the Superior Court before October of 1958?
A No.
Q Sometime in 1958 you were arrested, is that right?
A Right.
Q Do you remember the date?
A Not really.
Q It was prior to October 22nd when you were arraigned in Superior Court, is that right?
A Right, yeah.
Q Were you brought to the police station?
A Right.
Q And who was there when you got there?
A You mean the police?
Q No. In terms of other arrestees?
A Well, I saw two bags on the table and when I got into the cell block Bobby Kandos was there.
Q Was there anyone else arrested at that time?
A Not in my case. But there were two other guys that are recognized, Bobby Capuano and Bobby Charpeneau.
Q Were they known to be associates of Kandos?
A Yeah. **[6]**

Q Now, the next day you were charged with this offense, is that right?
A Right.
Q Did you have a lawyer at the time you were charged in District Court?
A No.
Q On October 22nd you appeared in Superior Court, October 22, 1958, is that right?
A Right.
Q And who was your co-defendant in that case?
A Bobby Kandos.
Q How old were you on the date that you were charged with this offense?
A I had to be eighteen.
Q And do you know how old Kandos was?
A He was a little older than me.
Q When you appeared in the Superior Court on that arraignment date did you have a lawyer?
A No.
Q Had you made any efforts to hire a lawyer before that?
A No.
Q Do you recall whether or not a plea of any kind was entered on that day? This is your first appearance in Superior Court?
A No, I think--oh, no. the judge says I'm going to enter [7] a plea of not guilty.
Q Okay. And where did you go from there?
A I went to the can.
Q All right. Did you see Robert Kandos while you were in prison?
A Yes.
Q Did you have any discussions with him about the case?
A Yeah.
Q What were those discussions?
A Well, I said to him Bobby, what's going on over here? What am I doing in this case. What am I doing in trouble with you? And he started to avoid

me. He said, well, listen I can't explain nothing now but down the road I will take care of things. Don't worry about it. I'm going to get a lawyer and I'm going go get you out of trouble so, okay. He lives on one side. I live on the other side of the block. And in 1958 you didn't get out much so I didn't really get much of a chance to talk to him.

Q All right. While you were in prison after October 22, 1958, did you ever see a lawyer while you were there?

A No.

Q Were you given a copy of the indictment?

A No.

Q Were you shown any discovery of any kind? **[8]**

A No.

Q Did you in fact know the specifics of what you had been charged with?

A No.

Q Did the name Betty Kirzner mean anything to you?

A No.

Q Did you know what the legal definition of robbery was at that time, the elements that constitute it?

A No.

Q On December 12th of 1958 you were returned to the courthouse?

A Right.

Q Is that right?

A Yeah.

Q Had you seen a lawyer up to that point?

A No.

Q It was in this very courthouse?

A Yeah.

Q And you were down in the cell block?

A It might have been in this courtroom.

Q Were you down in the cell block?

A Yes.

Q While you were down in the cell block did a lawyer come down and talk to you?

A No. **[9]**
Q Were you shown a copy of an indictment on that day?
A No.
Q Did you have a discussion about the facts of your case with anyone on that day?
A No.
Q Did anyone discuss with you what the crime of robbery was before you came into the courtroom?
A No.
Q Did there come a time you were brought up into the courtroom, is that right?
A Yeah.
Q And do you recall who the judge was?
A Joslin.
Q When you walked into the courtroom at that moment had you hired a lawyer?
A No.
Q All right. Was there a lawyer there?
A Yes.
Q What happened while you were in the courtroom?
A Now this is on the 12th of December?
Q Yes.
A The clerk said Your Honor this is nolo contendere and first of all your name Gerard Ouimette. This is nolo contendere. The judge said nolo contendere. Okay. We will put it off until the twelfth of next month and I **[10]** went back downstairs.
Q Did you know what the words nolo contendere meant on December 12, 1958?
A No.
Q Did you have any lawyer to explain to you what those terms meant?
A No.
Q While you were in court on that day, December 12, 1958, did your lawyer or the judge or the prosecutor say what the elements were for the crime of robbery?
A No.

Q Did anyone including the court, your lawyer or the prosecutor discuss possible defenses to the crime of robbery?
A No.
Q Were any facts involving the actual crime of robbery with which you were charged discussed on that day?
A No, not one.
Q Did anyone tell you what the penalty for robbery was?
A No.
Q Were you ever asked on that date to waive any rights?
A No. **[11]**
Q Did anyone tell you that a plea of nolo contendere was equivalent to a plea of guilty?
A No.
Q Did anyone tell you that by pleading nolo you were giving up your right to a trial?
A No.
Q Did anyone tell you by pleading nolo you were giving up your right to be represented by a lawyer at a trial?
A No.
Q Did anyone tell you that if you had a trial you could present witnesses in your own defense and testify if you wished?
A No.
Q Did anyone tell you by pleading nolo you were waiving all of that?
A No.
Q Did anyone tell you you had a right to appeal a conviction after trial?
A No.
Q Now after you finished that proceeding in the court that day where were you brought?
A Back to the can.
Q When you went back to the -- you say the can, you mean the prison?

A Yeah.
Q When you went back to the prison that day did you see a lawyer?
A No. **[12]**
Q Did you ever see that lawyer again?
A No, I never saw him, no.
Q Do you remember who the lawyer was?
A I don't even know who he looks like if he walked in the courtroom today. If he walked in the courtroom today I wouldn't know what the guy looks like.
Q This was certainly someone that was not retained by you?
A No, I didn't have any money.
Q And did the court appoint a lawyer for you?
A Not that they told me.
Q Now when you returned to the prison you didn't see a lawyer yet?
A No.
Q How about Kandos, did you see him then?
A Yeah.
Q And did you have some discussions with him?
A Yeah.
Q And what were they about?
A He just said that--I said, Bobby, what am I doing over here? What's going on with this case? What am I doing here? What's going on? And I asked him about this nolo thing. He said don't worry about it. It means I don't admit nothing. You're going to go to trial. I got a bigger headache. I got a rape case. But I'm going to get you out of trouble. I got you a lawyer. Don't **[13]** worry about it. I'm waiting and waiting for this lawyer to come and see me.
Q On January 12th of 1959 you were brought back to the Superior Court, is that right?
A Right.
Q And was it the same judge that you had seen on December 12th?

A Yes.
Q On that occasion was the lawyer present?
A I can't tell you because I don't what the guy looked like, you know. I don't know. There was a couple of guys standing next to me but nobody said I'm your lawyer, you know.
Q All right. Were you told on that date that you weren't going to have a trial?
A No.
Q Were you told anything about rights you were waiving?
A No.
Q Were you told anything about the penalty for robbery?
A No.
Q Were you asked any questions at all?
A None.
Q What actually occurred on January 12th?
A The clerk said again Your Honor this is nolo plea contendere. The judge said okay nolo contendere. I **[14]** sentence you six years ACI and that's it. I turned around and --
Q Before the judge pronounced sentence were you given any opportunity to speak on your behalf?
A No.
Q Were the facts explained to you that day?
A Nothing.
Q After you got the six years where did you go?
A Back to the can.

MR. CICILLINE: That's all I have.

THE COURT: Mr. Fowler, questions?

MR. FOWLER: Yes.

CROSS-EXAMINATION BY MR. FOWLER:

Q Mr. Ouimette, you said at the time that you took this plea you only had a seventh grade education, is the correct?
A About that.
Q So you never graduated from high school?

A No. I took the GED about 1970. Maybe '75, '74. I'm not sure. Around there.
Q And did you get your GED?
A Yeah.
Q In fact not only did you get your GED, you took some college courses, didn't you?
A No, I was tutored. **[15]**
Q You were tutored?
A Yes.
Q You didn't take any college courses?
A Not that I can remember.
Q Back in September--on September 15th of 1976 when you were before Justice Needham in Providence Superior Court do you recall being asked, Mr. Ouimette, How far did you go in school and you replied I took a few college courses, do you remember that?
A I remember I was tutored by college students. But if you call that a course, you know, that's what I meant. I took the SAT just prior to that, too. I was looking to go to college actually.
Q You stated that you had been in juvenile court a few times, isn't that correct?
A Yeah.
Q When you went into the juvenile court do you recall having some kind of exchange with the judge before they did anything with you?
A Well, actually when you got to juvenile when you--this is in the '50's now. The only times I can remember when I went in front of the judge, which he was a judge, you sat at a table like this. There was a couple of people there and they said well, you know, we got to send you back to the training school. That was it, you know. **[16]** You had no rights. You had nothing. I had no lawyer. So I mean when I got arrested in '58 I figured this is like the juveniles. You go in. You get accused of something and they put you in the can.

Q And you testified, did you not, that before October of 1958 when you appeared in Superior Court on the robbery charge you had never been to court before?
A I don't believe I was ever in Superior Court.
Q Were you in District Court?
A I think I had a couple of--I had a fight or two.
Q Do you recall when you were arrested on the robbery charge what the date was?
A Not really, no.
Q Do you recall being put in prison on October 22nd of 1958?
A Yeah.
Q Was that with respect to the robbery charge?
A Yeah.
Q And Mr. Kandos was also charged with that robbery, isn't that correct?
A Right.
Q On August 1st of 1958 almost three months before being arrested for this robbery do you remember being in Sixth Division District Court charged with a simple assault by the Providence police? **[17]**
A I remember being in a restaurant one night and some guy come in and bumped me and I hit him a punch and he hit his head in the juke box. I think that's the case you're talking about.
Q So my question to you do you remember being in court for that charge?
A I remember just getting arraigned.
Q Do you recall pleading to that charge and receiving thirty days to serve?
A Not really, no. I think I did get thirty days for it.
Q You don't recall pleading to it in court?
A No. What was the date, sir?
Q On August 1st of 1958?
A What date was the plea?
Q August 1st of 1958.
A I pleaded the same day I got arrested--that I got arraigned.

Q Is that air to say you plead the same day?
A It might have been. I remember being in court for the assault.
Q At about three and a half weeks later on August 30th do you recall being back in court in Sixth Division District Court on a Providence police charge of a misdemeanor larceny and pleading to that charge for a **[18]** thirty day concurrent sentence?
A That's possible, yeah.
Q Do you recall that today?
A Yeah, I say that I remember going to the lower court, yeah.
Q Were you represented by a lawyer in either of those cases?
A I don't think so.
Q Do you recall being represented by the Public Defender?
A Possibly, but I don't remember.
Q Do you recall discussing those cases with an attorney before you pled to them?
A I'm trying to think. I don't think I had a lawyer.
Q So you're telling us today that you have no recollection of having a lawyer?
A No, I just don't remember having a lawyer. I remember being there.
Q Do you remember being there? You remember pleading to those cases? You're not disputing that?
A Yeah.
Q Mr. Ouimette, since October of 1958 you have been in Providence Superior Court a number of times, haven't you?
A Yes.
Q You entered pleas of nolo contendere to a number of **[19]** different cases, haven't you?
A I pleaded to the possession of burglary tools. I had a master key. Somebody developed it trying to sell to the Russian people and I pleaded again with

Jack on a gun case for assault. They were guilty pleas. I don't know if they were nolo pleas.

Q You have also been to Providence Superior Court for trials on certain cases, haven't you?

A Yes.

Q In fact you have been convicted in Providence Superior Court before, haven't you?

A Twice, yeah.

Q Do you recall being before the Providence Superior Court in July of 1965 and receiving a sentence of fifteen months at ACI suspended?

A Um-hum.

Q With three years probation for possession of burglary tools?

A That was the master key I told you about it, yeah.

Q Is that fair to say that was the master key that they had found on you that fit George's T.V. store on Eddy Street? Do you recall that?

A Well, the cops said I kicked the window in or something. Either I was going through the front door or I was going to kick the window in. **[20]**

Q We're talking about the same case?

A Jack said they considered a master key a burglary tool so I had to plead to it.

Q So on August 31st of 1965 do you recall having that fifteen months suspended sentence revoked and being sent to the ACI for fifteen months based on a Warwick Police Department report that you were involved in an incident with Ronald Sweet at the rear of the Gordon Junior High School in Warwick?

A Yeah.

Q Isn't it also true the substantive charge was dropped? That case was later dismissed?

A Right.

Q On January 17th of 1968 do you recall being charged with possession of a firearm while you were in a private club in Providence and arrested by Detective Vincent Vespia?

A Honest Vinny.
Q Do you recall that?
A They bargained with Corrine Grande. He lied so much. Let me explain one thing about that case if I can.
THE COURT: Go right ahead.
A I went on a motion for illegal entry with Mr. Vinny Vespia. I want to tell you his testimony was all in contempt. He said that he walked in the door and Mr. Anthony Caruso was cleaning the gun. He pushed the **[21]** gun to me and I pushed it out of the way. That was the hearing. During the trial a year later Mr. Vespia said when he walked in the door Mr. Caruso was cleaning the gun. I took the gun off Mr. Caruso turned around and pointed at him and threw it over my shoulder. That's how I got found guilty if you want to talk about the case. That's all on record.
Q In spite of that isn't it fair to say on May 28th of 1958 you were found guilty after trial to the charge of possession of a firearm after having a prior conviction of a crime of violence and--
A 1958?
Q And you were sentenced to five years at the ACI, isn't that correct?
A Right. And the robbery case prevented me from testifying in my own defense because I had the robbery case in 1958.
Q On July 14th of 1969 isn't it also true that you were found guilty after trial on a Providence charge of assault on a uniformed police officer and you received a three year suspended sentence with three years probation?
A Another honest guy who was indicted five years later for fourteen breaking and entries. If the jury would have known his character then you think they would have found **[22]** me guilty of assault when he hit me in the head with a blackjack. Come on.

Q Is that a yeah?
A The same cop that said I assaulted him hit me in the head with a blackjack and then years later got indicted for fourteen breaking and enterings and got off the force. Indicted and charged.
Q Mr. Ouimette, do you remember my question?
A Yes, sir.
Q My question to you is you were found guilty after trial and sentenced to three years suspended, three years probation?
A Absolutely.
Q On June 4th of 1971 did you plead nolo to possession of a firearm and received two years at the ACI?
A The guns were in my house. I had a bullet in my foot. I had people trying to kill me, sir.
Q You were found to be in possession of a .45 caliber pistol, isn't that correct?
A Yeah.
Q On March 16th of 1973 do you recall pleading to the charge of failure to stop for a police officer in Washington County Superior Court and receiving a sentence of a fifty dollar fine and court costs?
A Yeah. **[23]**
Q On July 10th of 1972 do you recall being sentenced to ten years at the ACI consecutive to the sentence you were already serving for conspiracy to commit murder?
A Right.
Q Isn't it also true that you later filed a motion through counsel to reduce that sentence?
A Yes.
Q That sentence was reduced from ten years to serve consecutive to ten years to serve concurrent, isn't that true?
A Because you know why? Can I explain that, sir.
THE COURT: Yes.
A Mr. Billy Miller had forty years and he stuck up a bank. He got forty years in the Federal

penitentiary. They made a deal with him to take four years to take the forty years away and give him four years to do on some air force base. Six months after the trial was over we found Mr. Miller's wife. She testified that he was hiding in an alley way when somebody got shot. His wife later said that he was an out-and-out liar to the police. Told her to leave town. This is all on record. And that she was home with him the whole month that she testified he was hiding in an alley way. That substantiated his testimony and they found him not guilty on murder so another good case they had against **[24]** me.

Q Mr. Ouimette, isn't it also true on June 4th of 1971 you pled nolo contendere to a charge of assault on a correctional officer and you were sentenced to one year at the ACI consecutive to the sentence you were already serving?

A That was all one thing put together I believe.

Q Is it fair to say that was the sentence you received on that?

A Yes.

Q On September 15th of 1976 isn't it also correct that you plead nolo contendere on a charge of assault with a dangerous weapon and conspiracy to assault with a dangerous weapon and received a sentence of three years suspended and four years probation on each count concurrent?

A Yes.

MR. FOWLER: May I have one moment please Your Honor.

THE COURT: Yes.

Q Mr. Ouimette, isn't it also true that on February 11th of 1984 you were found guilty of receiving a firearm that had been transported in interstate commerce after having a prior conviction of a crime punishable by more than one year in jail, that being in the Federal **[25]** District Court for

the District of Rhode Island, and you received a sentence of nine years, is that correct?

A No. I received a sentence of eighteen years.

Q There were two counts, isn't that correct?

A Count 1 nine years, Count 2 nine years consecutive.

Q Isn't it also true that on February 1st of 1996 the Federal District Court sentenced you to life without parole based upon a conviction for conspiracy to collect extensions of credit by extortion and actual collections of credit by extortion and aiding and abetting?

A Right.

Q That's correct?

A Yeah.

Q Mr. Ouimette, you also stated that just minutes ago that during the time of this robbery case in Providence Superior Court in 1958 not only were you never advised of the rights that you were giving up or the rights that you in fact had but there were never any discussions about the facts of the case. Is that what your testimony is here today?

A I never saw a lawyer.

Q You appeared in court on more than one occasion for that case, isn't that correct? Three actually?

A Well, three in Superior Court.

Q Mr. Ouimette, you're familiar with the workings of the **[26]** Providence Superior Court to some extent, aren't you, with respect to criminal charges and appeals?

A You know, the worse thing I ever did I got thirty-four years in the penitentiary. In the last thirty-two years I never picked up a law book. You know, you always count on your lawyer. You know what I mean. You say, well, my lawyer is going to take care of it. But your lawyer is not God, you know. You know, they only have enough time in a day.

Q Is that a no?

A As far as the mechanisms of the courthouse?
Q Yes.
A I mean, what do I know? What is there to know? I mean I never went to law school. How do you find out? Is the clerk got time enough to tell you, you know? Now I imagine the laws are different. The judge explains things to you. You have to sign an agreement. In 1958 it was like makeup George. I don't know where you were, sir, but you know it was like a Lassen. Bring them in and that's it.
Q Mr. Ouimette, with respect to my question, today as you stand here you are fairly familiar with the workings of the court, are you not?

MR. CICILLINE: I object to this fairly familiar.

THE COURT: Overruled. You can answer the **[27]** question.

A In what sense?
Q You have been before the Superior Court more than a dozen times, haven't you?
A I haven't been in this courtroom in this court house in the last twenty-five years.
Q That's not my question, Mr. Ouimette. Did you hear my question? The number of times that you have been in court in the last forty years is over a dozen, is it not?
A I don't know about here but probably over a dozen with postponements and trials, yeah. Probably.
Q And on motions as well, isn't that fair to say?
A Well, you know, like I said, you know, you don't think about motions because those are lawyers things to do, you know. If you paid a lawyer you figure he is going to take care of you. You don't ask questions.
Q And you have paid lawyers in the past, haven't you?
A Absolutely.
Q Can you recall some of those lawyers?
A Please.

Q Can you recall--do you remember some of those lawyers?
A John Sheehan, Jack Cicilline. Mostly Jack. He has been my lawyer since 1956.
Q How about Paul DiMaio, did he ever represent you? **[28]**
A Paul DiMaio, what a mistake that was.
Q How but Richard Egbert?
A Egbert is an excellent lawyer.
Q He represented you as well?
A Yes.
Q In fact he represented you in 1976, didn't he?
A Please.
Q In 1976 he represented you, didn't he?
A No.
Q In 1981?
A '81, what did I get? No. Jack represented me in 1981.
Q Mr. Egbert did represent you at some point, didn't he?
A I didn't meet Egbert until--oh, wait a minute. No, no. '86 was the first time when I went back for a hearing in Connecticut on the motion on the gun case.
Q That was on your motion?
A The Circuit Court in Connecticut sent it down for a hearing because of something that happened. We had a witness that said that the cops kidnapped him. But Egbert didn't handle it. It was Konselor.
Q Mr. Egbert did represent you, correct?
A In '86, year, he represented me in my last case.
Q Stephen Famiglitti also represented you, did he not?
A No, he prosecuted me, but he never represented me.
Q You have been represented by a number of attorneys? **[29]**

A Yeah, but mostly by Jack and John Sheehan. Never by Mr. LaFazia who has been listed as my attorney from 1958. You can see that I never, never let him represent me so I don't even know where he came from.
Q You have been in Federal Court as well on a number of occasions, isn't that fair to say?
A On probably two or three occasions, yeah.
Q When you were in Federal Court you were represented by counsel, were you not?
A Yes.
Q Do you recall being before Federal District Court judges in the past?
A Federal District Court judges?
Q Yes.
A Sure.
Q Have you plead in the Federal District Court in the past?
A. Yeah, once. Assault on an agent. But Jack says that if he thought I was going to assault him then I am guilty of assault so what are you going to do.
Q In addition to that plea you have been convicted in the Federal Court, correct?
A Yeah.
Q After you were convicted or pled in Federal Court before you were sentenced you were presented with a presentence **[30]** report?
A Absolutely. You have to read it and agree to it.
Q You were given that presentence report thirty days before the time of sentencing and you were given ten days to review it and object to any portion of it, isn't that fair to say?
A Well, you know, what do you do? You're found guilty. The guy wants you to read the presentence report. You know, what are you going to get. So most of the time you just say listen here, I will sign it, and that's it, you know.
Q In answer to my question is that a yes?
A What's your question?

Q My question is you are aware of the procedure?
A Right.
Q And you had the opportunity to look at your presentence reports in Federal Court, did you not?
A Right.
Q And in fact on prior occasions when you were presented with those presentence reports they include the details of the arrests and convictions you had in the past, isn't that true?
A Right.
Q And not only did they list arrests and conviction but the listed dates, sentences? **[31]**
A Right.
Q And a summary of the facts, isn't that true?
A Right.
Q And in fact specifically with respect to the 1958 robbery those presentence reports listed a paragraph detailing that you along with your co-defendant robbed the shop owner by name of Mrs. Kirzner at gun point. That an undetermined amount of cash was taken. That Mrs. Kirzner was placed in a storage area in the cellar, and that you later admitted that you were the suspect holding the gun when the incident took place?
A Not true.
Q You don't recall reading that summary of facts?
A I remember reading the presentence report but not that I admitted to anything. As a matter of fact the presentence report says that there were two masked men. That wasn't true either. That wasn't true either.

MR. FOWLER: Your Honor, I have a document entitled District Court of the United States for the District of Rhode Island criminal proceeding number 83-59 addendum to an opinion dated June 24, 1984, I ask it be marked for identification.

THE COURT: The clerk will mark it for identification.

MR. FOWLER: May I approach the witness. **[32]**

THE COURT: You may.

Q Mr. Ouimette --

THE DEFENDANT: Can I get my glasses over there.

Q I'm going to show you a District Court opinion, and that was issued on June 28th of 1984 by Judge Raymond Pettine. On page two Judge Pettine indicates that the presentence report in this case shows the following. I'm going to ask you to take a look at that first indented paragraph. It begins 5-18-58 robbery.

A I see these things were misleading. When my case went for the sentencing Kandos with his lawyer made a deal for his rape case and said that I was the guy with the gun. That's what I was sentenced under those facts. Never did I admit in court or anywhere else that I had anything to do with this case.

MR. FOWLER: Your Honor, I move to have that stricken. I haven't even posed a question yet.

THE COURT: Granted.

Q Mr. Ouimette, my question to you is you just told us that on more than one occasion you had the opportunity to review your presentence reports before you were sentenced in the District Court, isn't that true?

A Yeah, absolutely.

Q And during those times have you ever seen that charge with that paragraph of facts listed? **[33]**

A Actually I didn't. But let me tell you something else. In 1984 --

Q You answered my question. Thank you.

A Can I explain?

THE COURT: Your attorney will have an opportunity to ask you further questions.

MR. FOWLER: Your Honor, I would ask that be admitted as a full exhibit if there is no objection to its authenticity.

MR. CICILLINE: I have no objection.
THE COURT: Full exhibit.
THE CLERK: State's one marked full.

Q Mr. Ouimette, let's forget about January of 1959 for a moment. Let's talk about some of your other convictions in Providence Superior Court. On the occasions later on in your career when have been a Providence Superior Court do you recall taking pleas before Providence Superior Court judges?

A Yeah.

Q And you just stated, did you not, that the procedure now is different, isn't that correct?

A Well, in the last couple of years I started to realize that, you know, you start investigating. I never knew you could attack prior convictions. That's why I never bothered to do anything about what my presentence report **[34]** says.

Q Well, when was it you first realized that the procedure is different now?

A When I starting reading in the last year or two.

Q But in fact you had been to court at least nine times in the cases that I just reviewed with you before the last year when you started reading, isn't that correct?

A Yes.

Q On those occasions when you pled to a case or before you went to trial you were aware of the rights that you had, isn't that true?

A Well, your lawyer usually takes care of all that so when you're going to plead guilty he says well, I'm going to go in there and plead you guilty, and that's it. Here's what we are going to do, and so there is not much. You don't have to be a rocket scientist. You have a lawyer that's going to do all the work for you. That's what he's paid for.

Q Is it your testimony today that in the last twenty or so years Mr. Cicilline has never told you your rights when you came to court either to be involved in a trial or to take a plea?

A Oh, yeah. He told me we can go to trial or we cannot go to trial. If you go to trial here's what they are going to prove. Here's what they are going to put against you **[35]** so we make a decision.

Q You have never been dissatisfied with Mr. Cicilline?

A Never. He is not only my lawyer, he is my friend. He has always been honest with me.

Q You always felt he advised you of everything you needed to know before you made a decision?

A Absolutely.

Q Mr. Ouimette, in February of 1994 after you were convicted by a jury for receiving the firearm that had been transported into interstate commerce after a prior conviction, isn't it true that the Government moved to have you sentenced under the dangerous special offender statute?

A That's true.

Q You were quite aware they were attempting to do that?

A And they used that robbery charge again for that.

Q They used that robbery charge?

A For everything.

Q As part of their reasoning, isn't that correct?

A Yeah, they destroyed me. That robbery charge was the worst thing that ever happened to me in my life, and I was stone innocent of it, sir.

MR. FOWLER: I just ask the answer be stricken, the last portion.

THE COURT: I will allow it to stand. Go ahead. **[36]**

Q And at the time that the Government attempted to have you sentenced under the dangerous special offender statute you through your attorney objected to that, didn't you?

A Yeah, but not enough. I wish I would have known a little about the law then that I know now.

Q You know enough about the law to know that at that time that you were denied and the Government won and you were sentenced?

A I am the only man in the country--I am going to answer that--that is sentenced for one course of conduct twice. No one else in the country is sentenced this way. I am the only guy in the country--went to the United States Supreme Court--that got nine years for possession and nine years of possession with erased numbers. You can only possess a gun once. The Eighth Circuit Court of Appeals just come down with a decision, the **Blockburger** decision. I'm going to give him that case which says the Federal District Court was wrong. I am the only guy in the country sentenced that way.

Q So you remember that one very well?

A I have to live with these things. I mean I've been crippled in the last few years.

Q My question is you remember that one very well, don't you? **[37]**

A The two nine year sentences?

Q The sentencing enhancement?

A Of course.

Q In fact when that occurred Judge Pettine issued a written opinion, the addendum to which has been moved into evidence, do you recall that happening?

A I told you I used Mr. DiMaio once and never again, and it was a mistake.

Q My question to you is when that happened Judge Pettine issued a written opinion. Did you ever look at it?

A I never got it. I fired Paul DiMaio right after the trial and hired Bill Konselor.

Q So you're aware that, according to your testimony, you're the only person who has ever had his sentence enhanced in that fashion?

A One course of conduct. The way I was sentenced I am the only guy in the country sentenced that way up until the Federal guidelines come into effect. Now I don't know but we researched it. When I went to the can I sat down with a jail house lawyer and he said there are seven circuits in my favor that said they couldn't do it and two circuits said they could, the First Circuit and the Second Circuit.

Q During the course of your research didn't you also find that a criminal conviction could be shown to be invalid **[38]** if for example a defendant was not afforded a lawyer at the time of the proceeding?

A Well, no, because I wasn't looking in that direction and never thought that. After the sentence was over I figured it was over with. The damage is done and let me move on with my life. I didn't start really trying to find out about the laws until the last couple of years because in the penitentiary now everybody is into dealing with laws because they got so much time they got to go to the law library.

Q Incidentally, Mr. Ouimette, today here in the Providence Superior Court this is the first time you ever suggested to any court that your pleas in 1959 was not a knowing and voluntary plea?

MR. CICILLINE: Objection.

THE COURT: Overruled.

MR. CICILLINE: Judge --

A Yeah, it's clear I got the case filed long before today.

THE COURT: You want to rephrase the question.

MR. FOWLER: I will rephrase the question.

Q The motion that you filed with respect to the hearing, the reason why you are here today, that motion is the first time in the last forty years --

A Absolutely.

Q That you ever brought to the attention of the Court that **[39]** your plea was not a knowing, voluntary plea, isn't that correct?

A Absolutely. Because I told you I never realized that there was anything that could be done about it.

Q In 1984 you filed a motion--strike that.

MR. FOWLER: May I have just one moment, please, Your Honor.

THE COURT: Yes.

Q Mr. Ouimette, we just spoke about your being in court in the Federal District Court for the District of Rhode Island in 1984 and being sentenced as a dangerous special offender. While that sentencing was pending or you had been sentenced, I'm not sure which, isn't it correct that you filed a motion in the State court challenging your good time credits that were owed to you at the ACI in the State system?

A Yeah.

Q By alleging that your release date from State prison was later than it should have been on your ten year sentence?

A Yeah, right.

Q And in fact you took that case all the way to the Rhode Island Supreme Court, didn't you?

A I had Konselor on that case, yeah.

Q So you were represented then as well? **[40]**

A I was a big boy then, Mr. Fowler. No disrespect. I had to grow up in a hurry.

Q And as I said before you took that case to the Rhode Island Supreme Court. In fact it was a reported decision, isn't that true, you were denied?

A I got out and then I would imagine the case became moot. That's what Konselor told me.

Q Let me just --

A I think that's what happened.

Q You recall that motion to get your good time credit?

A Yeah, sure. The judge sentenced me concurrent. He first of all sentenced me consecutive. Then he sentenced me concurrent. Concurrent meant concurrent with the eight year sentence that you're now serving so my argument was that concurrent meant together. He didn't say concurrent from this day. He said concurrent so my good time should have added time, six and a half years. They held me almost nine years. So that was where my beef was.

Q You filed that motion after you got out of prison in fact?

A I filed that--are you kidding. I filed that in '76. That's when I got Konselor actually when this '76 case happened, if I can explain it. I really didn't want to plead to this '76 case because I did nothing wrong. And **[41]** when I got in a little argument with Needham I said, well, let me get another lawyer. So I had DiBiase and I eventually hired Konselor then the prosecutor called me to testify as a witness, State witness, which was a sneak attack. I testified. Then he gave me eight perjury charges for testifying because I took the plea that I didn't want to take in front of Needham so now I am stuck with Konselor who I paid to get my motion for new trial on the conspiracy case. Now he's got to go in and represent me on the eight perjury charges and I got to go back in front of Needham who I got to be good to him because if I ain't this guy ain't going to let me off the hook between the eight perjuries. I got stuck between a rock and a hard place. Needham dismissed eight perjury charges, and I just forgot about it.

Q Your motion for good time credit was denied, wasn't it?

A Like I said it became moot. I don't know. I never got the decision.

Q Well, you filed another motion in Federal?

A I hired lawyers. I didn't do nothing. I don't know what they were doing.

Q Mr. Ouimette, when I said you filed, you filed through your attorney?

A I higher the lawyer. He does the work. Half the time you don't want to look at these things. I don't know **[42]** what legal terms mean. I mean I don't know what to do. Do you look at a dictionary? Do you look at a law book? Just recently in the last year and a half and only because I see a lot of common sense that guys say, Jerry, look, read it. It's just common sense. But prior to that I didn't want to see about the law. I had a hundred things on me happening. I paid lawyers to represent me.

Q Mr. Ouimette, were you aware at the time that your lawyer filed a motion, the same type of motion was filed in Federal Court to try and get your good time credits?

A Which case is this now? I mean I filed motions in '75, '76 to try to get out.

Q After you were released from prison October of 1977?

A I don't know if he did that. Konselor did that. Why would I do it? I'm home.

Q So you're not aware that your attorney filed a motion on your behalf?

A No. He might have did it on his way. Konselor was a strange guy. He had just started coming to Rhode Island and he was bouncing around doing a lot of things in the town. He might have took it on his own to do it.

Q So you're telling this Court that you're not aware of the fact that that motion was filed coincidentally in Federal Court? **[43]**

A Federal time, I know we filed a motion prior to my sentencing as a dangerous special offender because if they were to give me my good time the way they were supposed to give it to me then the

five year period would have ran, and they couldn't have given me dangerous special enhancement.

Q Exactly. That's just my question to you. So you were aware that a motion was filed to try and prevent you from being sentenced?

A Right.

Q As a dangerous special offender?

A Right, yeah.

Q Exactly the same time?

A The decision that came down I never read it because like I said, you know, if a judge gives you a decision he is a judge. He is a brilliant guy. Am I going to start reading things and say the guy is wrong. I don't know. The lawyer says he did. That's it.

MR. CICILLINE: Would you accept that?

THE COURT: Thank you, Mr. Cicilline.

A Just another bad decision you get and you throw it in the box.

Q My point is you were very aware at that time if the Federal Court accepted your lawyer's argument you would have been taken out of the Federal statute definition of **[44]** a dangerous special offender?

A Let me explain something. Paul DiMaio --

Q Please just answer my question first.

A If the judge agreed with my good time, yeah, I would have--they would have taken me out.

Q It would have taken you out of the definition of special offender?

A Absolutely.

Q So you have experience?

A No. You're misleading this court.

Q Please let me finish my question. You have experience through the attorney--through the attorneys that you hired of filing motions in order to escape Federal enhancements in sentencing?

A I had the experience of his analogy. That's all we get. The lawyer says to me listen here, here's what

we are going to do. Fine. If it doesn't work out five months later, a year later, what are you going to do. You don't know the intricacies of what's going on. I never picked up a legal piece of paper in my life. I figured if the lawyer can't do it, shame on me.

MR. FOWLER: One moment, please, Your Honor.

THE COURT: Yes.

Q Mr. Ouimette, on February 1st of 1996 was the last time you were sentenced in Federal Court, isn't that correct? **[45]**

A February what?

Q February 1st of 1996?

A 1996, yeah.

Q That's the last time you were sentenced in Federal Court?

A Yeah, I think so.

Q Correct?

A 1996, yeah.

Q And during that procedure that presentence report was used?

A And I didn't read that either. I mean actually I'm glad you bring this up because this is on record, too. I was supposed to have a four hour sentencing hearing. The trial was so bad the Government was so treacherous I said, Richard, sit down and keep your mouth shut. The judge looked at us three times. Ten minutes went by. I said I guess there's no secrets. Why stand up. I knew I was going to get a life sentence. What's the sense of reading anything. Stand up, Mr. Ouimette, and I got a life sentence.

Q Mr. Ouimette, the --

A No disrespect, Your Honor.

Q Mr. Ouimette, in September of 1976 when you entered the pleas before Judge Needham on the assault with a dangerous weapon and the conspiracy charge do you recall **[46]** that?

A Yes.
Q That was with respect to the incident at the ACI?
A Absolutely.
Q Pasco Meo was the alleged victim--was a victim, isn't that correct?
A Right.
Q Isn't it true that after you received the three year suspended sentence with four years probation on September 15, 1976, in February of 1981 you appeared in court to argue or be heard on a motion for post-conviction relief, do you recall that?
A You know, I didn't even know Jack filed a motion to withdraw the plea until he came and see me about a year ago. But I know, year, we were looking to withdraw the plea.
Q Do you recall being in court for that?
A Well, I had some other problems at the time so I mean we were in court a couple of times, but I don't know which time in front of which judge.

MR. FOWLER: I have a one-page document entitled post-conviction relief I ask be marked State's two as a full exhibit if there is no objection.

MR. CICILLINE: No objection.

THE COURT: Full exhibit. **[47]**

MR. FOWLER: May I have one moment again, please, Your Honor.

THE COURT: Yes.

MR. FOWLER: I don't have any other questions. Thank you, Your Honor.

THE COURT: Thank you. Redirect.

REDIRECT EXAMINATION BY MR. CICILLINE:

Q Mr. Ouimette, you were asked some questions about some pleas in District Court in 1968?
A '58.
Q I'm sorry, 1958. Larceny and simple assault. Do you remember being asked that and acknowledging that you had those convictions?
A Yeah.

Q Do you remember standing before any judge and saying I plead nolo?
A No.
Q Do you know where the nolo conviction which is entered on your records comes from?
A I don't know what you mean.
Q Do you know how the words nolo got on your file for the summer of 1958?
A Probably because of a guilty plea.
Q Do you have any recollection going back to that summer of 1958 what would happen in District Court when you **[48]** went in and entered a plea to some case?
A You go in. See the clerk. And said okay. Listen, pay a fine, and that's it. That's it. You go in front of the judge. He gives you the fine, and that's it.
Q Okay. Did you ever utter the words nolo or nolo contendere yourself prior to October 28th of 1958?
A No.
Q Now, later on in 1969, 1970, 1971 and 1976, you entered pleas of nolo, is that right?
A Right.
Q And by that time the use of the plea affidavit was in place, is that right?
A Right.
Q And lawyers in those days went through the rights form with you?
A Right.
Q And gave you an opportunity to read it?
A Right.
Q But prior to 1969 none of that ever happened, did it?
A No.
Q Now, with reference to this report which indicates Ouimette admitted I was the suspect holding the gun, did you ever tell a probation officer that?
A No.
Q Did you ever tell a policeman that? **[49]**
A No.

Q How did that get in this report?
A Because that was part of the --
MR. FOWLER: Objection.
THE COURT: Overruled.
A That was part of the deal that Kandos made to get himself off the hook for the rape case which I knew nothing about.
Q At the time you and Kandos were arraigned on a robbery charge?
A Yeah.
Q Kandos had a separate case?
A Yeah.
Q And what was he charged with in that case?
A Rape.
Q Okay. And he entered pleas in both those cases, the robbery and his rape case?
A He got six and a half years for it. I find out later on they wanted to give him ten years.
Q Was there ever a time that you looked into the information regarding the robbery of Betsy Kirzner?
A Yeah, of course.
Q When was that?
A A couple of years after I bounced around the can and tried to find out what was going on. I went back. I **[50]** was eighteen. It was devastating to be in the can. I was all alone. But I finally found out that his partner was a kid named Bobby Charpeneau who he was protecting at the time, and Bobby Charpeneau incidentally was one of the guys that was arrested that night. He is the one that hooked up with Kandos to put me in the middle of this robbery.
Q Now, when was it that you first realized that you could undo an invalid plea?
A Actually about a year and a half, two years ago. What got me stimulated was this **Singleton** decision. Everybody in the can was stimulated by the **Singleton** decision and then everybody

starting going to the library. Then I started to talk to guys and, you know, then you start realizing that there are some things that can be done. That's when I got in touch with you and I said, Jack, you know, first of all I never had a lawyer. Second of all I never robbed the joint so then we started to communicate.

Q Had you been visiting the library at any prison prior to the decision of **Singleton**?

A I went once in 1986 or '87--in '86 I think it was--I was in the southern joint for six months. I had met a guy from New York. He said, you know, this case you got, it should be reversed because there is no way I could see **[51]** they can sentence you a twenty-year sentence with one gun. He said give me a couple of dollars. I'll research it for you. Once in awhile you got to come to the library, but I wasn't interested in this law stuff. I used to tell him you go do it. Just give me some facts. I gave him some facts. That's about how I really got involved with this law. That's about as far as I went.

Q What year was that?

A '85, '86.

Q Then more recently in the past year and a half?

A Yeah, the last couple of years. Everybody now in the penitentiary is getting more aware of legal things because everybody is getting buried.

Q As a result of your first learning that there was a chance for you to undo your 1958 conviction what is it that you did?

A What?

Q What did you do when you learned there was a change to vacate the 1958 plea?

A I got in touch with you.

Q You got in touch with me. Write, call? How did you go about it?

A I think I called. I wrote to you first and then Johnny went to see you. And then we started communicating back **[52]** and forth.

Q Okay. Prior to that did you ever have any information or knowledge of the fact that undoing a 1958 conviction was a possibility?

A No. Actually if I could have did in '84 it would have saved me nine years now that you look at, but I didn't know in '84 you could attack prior convictions. If you could I wasn't aware because I didn't go to the library.

Q Are you guilty of this robbery of Betsy Kirzner?

A No.

MR. CICILLINE: That's all.

THE COURT: Recross.

MR. FOWLER: I don't have anything else. Thank you, Your Honor.

THE COURT: Okay. The witness will step down.

MR. CICILLINE: Judge, I have no other witnesses. However, I am a little concerned about some of the questions that Mr. Fowler asked as it relates to the practice that was in place in 1958 as to whether or not the defendants were being advised of their rights back then and whether or not the form was in place. I would tell you that in **Bishop against Longlois** the Rhode Island Supreme Court acknowledged that none of this went on in the 1950's and that pleas were taken without giving defendants--without defendants being given their **[53]** rights and it was usually done in connection with a defendant's thought he might get lienency by doing it. The Rhode Island Supreme Court has acknowledged that was the practice that was in place. Since neither Mr. Fowler or I were around practicing in those days it would be extremely difficult to get witnesses to come in and testify to that. I am relying on what the Supreme Court said in that case that was the practice that was in place. **Boykin** was not

decided until 1969. So there would have been no reason why any Superior Court judge would advise a defendant about all these rights before **Boykin** was decided. As a matter of fact **Boykin** is a United States Supreme Court case. **Doyle**, which is a Rhode Island case, was decided in the same year. The practice didn't come in place until **Doyle** was decided and **Boykin**. So if there is a dispute over that I would rest on these motions.

THE COURT: Okay. The applicant rests. Does the State have any evidence for the Court to consider with respect to this application?

MR. FOWLER: No, Your Honor. The State is not going to put any witnesses on. However, with respect to the motion for the application for post-conviction relief as to information number 75-1436, which is the 1976 conviction, Mr. Cicilline just stated to the Court **[54]** that the copy of the transcript that he supplied to the court was attached to the motion itself. I would just like to have an opportunity with Mr. Cicilline just to look at the motion.

THE COURT: Let's revisit that in a minute. But going back to the first application that's contained in PM 98-4646 he has rested. The State has nothing to offer, is that correct?

MR. FOWLER: That's correct, Your Honor. I would just like to be given the opportunity to go through the memorandum and case law to argue.

THE COURT: We will return to that in a moment. The 75-1436, you're offering a transcript only, is that correct?

MR. CICILLINE: Yes, Your Honor.

THE COURT: Okay. Do you have a copy of that so the two of you can confer on that to make sure that there is no objection to the form that's being offered?

MR. CICILLINE: Unfortunately the only one I have is a marked copy.

THE COURT: Okay. Would the two of you approach for a second.

(Bench conference inaudible to reporter)

THE COURT: The transcript is being given to the clerk. That will be marked as petitioner's full exhibit **[55]** with respect to the 75-1436.

MR. CICILLINE: That's correct.

THE COURT: Nothing further in that?

MR. FOWLER: I have something further, Your Honor. With respect to the 75-1436 could I approach once more for a moment with Mr. Cicilline.

THE COURT: You may

(Bench conference inaudible to reporter)

MR. FOWLER: Your Honor, on the record I would like to submit a certified copy of the stenographic record of the hearing before Mr. Justice Needham on miscellaneous petition number 14244 Kent County Superior Court on February 24th and 25th of 1981. Preset at that time was Stephen Famiglietti, Special Assistant Attorney General for the State, and John F. Cicilline for the petitioner. I ask that be marked as a full exhibit.

MR. CICILLINE: Judge, I reserve the right to challenge this. I have no idea what that transcript is about.

THE COURT: I will mark it full. If after your review you feel it should not be considered, I will give you an opportunity to file an appropriate motion.

MR. CICILLINE: Thank you.

THE COURT: Full exhibit. Is there anything **[56]** further the State has with respect to the second matter?

MR. FOWLER: Only just to clarify for the record, Your Honor, and perhaps for ease of bookkeeping I would like to submit --

MR. CICILLINE: That's fine.

MR. FOWLER: A certified copy of the docket record of 1958 docket number 29046 pertaining to Robert Kandos and Gerard Ouimette with respect to the charge of robbery. I believe your Honor has the docket book itself, but this is a certified copy of the entry that pertains to this case and perhaps will be much easier to include this in the record.

THE COURT: State's full exhibit. Anything further, Mr. Fowler?

MR. FOWLER: No, Your Honor. Thank you.

THE COURT: I know that both the applicant and the State wish to provide memoranda.

MR. CICILLINE: That's correct, You Honor.

MR. FOWLER: Yes, please.

THE COURT: Is there any reason why you can't do it simultaneously given the opportunity to reply if necessary?

MR. CICILLINE: No, Your Honor.

MR. FOWLER: That's fine, Your Honor.

THE COURT: How much time do you need to submit a **[57]** memo?

MR. CICILLINE: Two weeks.

MR. FOWLER: That's fine, Your Honor.

MR. CICILLINE: Or earlier.

THE COURT: Let's continue it three weeks for control purposes. Two weeks to submit memos. I will give you a bench decision or advise you of the decision.

MR. CICILLINE: In the interim the defendant would like to return to Pennsylvania.

THE COURT: That will be ordered.

MR. FOWLER: May we approach for one moment.

THE COURT: Yes.

THE COURT: We will be in recess.

****

APPENDIX E

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

STATE)

Vs) Information No. 75-1436

GERARD OUIMETTE)

HEARD BEFORE MR. JUSTICE NEEDHAM
SEPTEMBER 15, 1976

APPEARANCES:

JOHN A. MURPHY, ESQ. FOR THE STATE
PETER DiBIASE, ESQ. FOR THE DEFENDANT

[1] WEDNESDAY, SEPTEMBER 15, 1976,
A.M. SESSION

MR. MURPHY: Your Honor, for the record, I'd point out this is Gerard T. Ouimette, but before the Court, I believe in several spots in the record the name is misspelled, Gerald is set forth. There have been extensive plea negotiations in this case, your Honor, and also evaluation of this case by myself, superiors in the Department Of Attorney General, members of the Department of R. I. State Police and the Department of corrections. At this time, the State is moving to amend Count I of the indictment insofar as it charges assault with intent to murder Pasco Meo as against this defendant, alone, the State would move to amend that to assault with a dangerous weapon on Pasco Meo.

MR. DIBIASE: No objection to that amendment.

THE COURT: Does the defendant consent in open court for the amendment of Count 1 to be now amended to read "Assault with a dangerous weapon on Pasco Meo"? Do you consent to that, sir?

DEFENDANT OUIMETTE: Yes.

THE COURT: Let the record show that the defendant has consented to the amendment.

MR. MURPHY: Your Honor, all of these amendations, I'll suggest to the Court and ask the Court and defendant to approve are based upon the evaluation of the evidence **[2]** in the case by the three departments that I have mentioned. on Count 2, the State would move pursuant to Rule 4B of the Rules of Criminal Procedure of this court to dismiss that count.

THE COURT: The prosecutor has the sole authority to nol pros the case. The Court will nol pros Count 2.

MR. MURPHY: Thank you, your Honor. On Count 3, the State would move to amend that charge wherein it now charges conspiracy to murder Pasco Meo, to a charge of conspiracy to assault with a dangerous weapon on one Pasco Meo.

MR. DIBIASE: Yes.

DEFENDANT OUIMETTE: Yes.

THE COURT: Let the record show the defendant has in open court consented to that amendment. Now we have a two-count information, the first charging assault with a dangerous weapon and the second charging conspiracy to assault with a dangerous weapon. To the information as amended, what plea is to be entered?

MR. DIBIASE: To the amended counts of this information, the defendant wishes to enter pleas of nolo.

THE COURT: Have you executed an affidavit?

MR. DIBIASE: At this time, if your Honor please, I'm presenting the clerk with two affidavits

which I have both read over and explained to my client, which in turn, explain **[3]** to him the ramifications of his pleas of nolo on each of these counts. I would invite your Honor to further question him as to his knowledge and belief in placing his signature on each of those affidavits.

THE COURT: Before interrogating the defendant concerning the affidavits, what evidence would the State be prepared to produce in support of the informations as amended?

MR. MURPHY: Your Honor, the evidence in this case that the State would be prepared to present is set forth in full in the various statements that are attached to the information charge which we have just amended. However, I might point out to the Court there has been considerable discussion on this point between defense counsel and the Court, several facts that lead the State to make the recommendation it will make to the Court.

First of all, in this case there has been an entire absence of any willingness to cooperate on the part of the two victims of the assaults that were charged in this information. Pasco Meo from the beginning has refused to cooperate in any manner whatsoever with investigation into this matter and would not be available to be a State witness in this case. Charles Fenner, also who is a victim alleged in Count 2, has not been a cooperative individual insofar as coming forth, participating in the investigation or being willing to be called as a witness in **[4]** the case. So far as the evidence the State would produce, the State would prove on October 28, 1975, at the Maximum Security section of the Adult Correctional Institution, this defendant along with three other men, Ronald Sweet, Richard Gomes, and Ralph DiMasi who's an awaiting trial inmate, were housed and also the two victims, Charles Fenner and Pasco Meo, were also housed in that section of the A.C.I. Pasco Meo was participating in a Disciplinary Board hearing in which he had been

charged with possession of a baseball bat. After the Disciplinary Board concluded that he was guilty of that charge, this inmate complained of an unfair disposition on those charges. He became enraged, went back down to his section of the Maximum Security prison complex which was the South State area of the prison which is separated physically from other areas of the prison. While he was in that area of the prison, he observed this defendant who was in a central hall area that separated the North and South State wings and centered his verbal criticism of the decision and also attacked this man in a verbal sense, called him names and such things as that. After a few minutes of this behavior, this defendant along with several other men who were in the North State area of the prison, went to the South State area of the prison, at which time a crowd of inmates gathered and three inmates who are charged with this defendant in the case administered wounds to these two individuals or certain physical **[5]** injury, especially Sweet, Gomes and DiMasi physically had contact with Pasco Meo and with Charles Fenner during the course of the time they spent in the South State prison area. At no time did any witnesses observe this defendant actually have physical contact with the two victims. However, he was observed with a weapon in his hands and he also had the original contact between Pasco Meo and anybody from North State, was with this defendant. Our proof would center on those elements of the crime, your Honor. Now there are certain problems that underlie the presentation of this plea negotiation and the recommendation that the State is making, with the proof of this case.

THE COURT: I'm not interested in the recommendation at the present time.

MR. MURPHY: Certainly, your Honor.

THE COURT: Mr. Ouimette, you've heard roughly what the Prosecutor says he would be prepared to show against you. In effect, he's saying

that, calling a spade a spade, that when you were called some dirty names, you went out and got some friends. He hasn't said so but the record seems to indicate you had a cast on your leg and you got your friends and you went out there, while you didn't put your hands on them, some friends that you got to help you administered a pretty good beating to this guy, and that you stood by there kind of enjoying it. Therefore, you're as guilty as they are and that constitutes the two charges they brought **[6]** against you, one for assaulting them. And if you were a principal, we're not kidding ourselves, you stood by and you watched it and you encouraged it, you become a principal; so you're guilty of the assault. That's what they said they charge you with. The other one is that your actions constitute a conspiracy: the four of you got together – while you didn't say "Hey, let's enter into a contract," that you got together and you knew what you were going to do and you went out and did it. The four of you acted together to give a guy a beating. That's what the State says their evidence equals. Is there anything you'd like to add to that?

DEFENDANT OUIMETTE: Not that I can think of.

THE COURT: That's pretty much the way it happened?

DEFENDANT OUIMETTE: Well no, actually I went over there to bang him in the mouth, but it didn't work out that way.

THE COURT: It got out of hand?

DEFENDANT OUIMETTE: Kind of, yeah.

THE COURT: Well, you realize by tendering this affidavit, that you're admitting that it happened that way and that it got out of hand, that you encouraged your friends to go out there and help you administer this beating and that you agreed to go out there and give him a beating. The fact that it got out of hand is besides the fact. That's what the effect of your asking

[7] me to accept the nolo plea means, do you understand that?

DEFENDANT OUIMETTE: Yes.

THE COURT: And that you're admitting there's a factual basis for the two charges that have been reduced against you. Do you understand that?

DEFENDANT OUIMETTE: Yes, sir.

THE COURT: You admit by tendering this plea, that you're guilty. You also know that you have a right to have either a judge or a jury pass upon even these reduced charges. You have a right to a trial by jury, even on the reduced charges and that by tendering this plea you give up that right . . . trial by jury and you're willing to do that?

DEFENDANT OUIMETTE: Yes, your . . .

THE COURT: You're also willing . . . up the right to bring any witnesses in in your own beh . . . o have your lawyer cross examine witnesses in your behalf and you're willing to give up those rights?

DEFENDANT OUIMETTE: Yes, your Honor.

THE COURT: You also know that in the event of a conviction that you have, in this case, as you are aware in other cases, you'd have a right to have the Supreme Court pas . . . upon whether or not you were properly convicted in this court and you're willing to give up those rights?

DEFENDANT OUIMETTE: Yes, your Honor.

THE COURT: Now there has been extensive plea bargaining and while I've not been privy to the plea bargaining, I did not engage in the plea bargaining, I'll say for the record Mr. Ouimette, my original feeling was that you ought to get some jail time. I think your lawyer probably told you that.

DEFENDANT OUIMETTE: Yes, your Honor.

THE COURT: It came to me this morning and after overnight plea bargaining, they tell me that you have been made aware of the fact that the State is about to recommend to me that on these reduced charges that you receive a three-year sentence which

will be served at the end of the present time that you're presently serving, that you will be placed on four years probation upon the suspension of that three-year sentence. Now is there any other inducement that has been offered to you for your plea in this case?

DEFENDANT OUIMETTE: Just a second your Honor. (conferring with Mr. DiBiase)

THE COURT: Do you understand what I'm saying?

DEFENDANT OUIMETTE: Yes, your Honor.

THE COURT: In other words, if you serve your full sentence that youre presently serving, if I accept the plea and I've indicated I will accept the plea and I'll impose the **[9]** sentence as recommended, I've indicated that in chambers. The sentence that I would impose would be that I would sentence you to a consecutive three-year term to commence upon the completion of your present sentence or upon your release on parole from your present sentence. I would suspend the serving of that consecutive term and place you on four years probation, which means that when you get out, no matter how you get out, the State would have a four-year hold on you during that period of your probation; and if you got into trouble, a trial judge could sentence you for a violation of that suspended sentence, up to three more years in the A.C.I. You understand it?

DEFENDANT OUIMETTE: Yes, your Honor.

THE COURT: Mr. Ouimette, I form opinions rather quickly. You appear to me to be an intelligent young man, but I don't know how far you've gone in school. How far did you go in school?

DEFENDAUT OUIMETTE: I took a few college courses.

THE COURT: I feel that the defendant has demonstrated that he fully understands the nature of the charge as reduced, that he fully understands the significance of his entry of a plea of nolo. I adjudge

him to be guilty of the charges as levied against him and reduced in the information and find that he has entered his nolo plea voluntarily aid with full knowledge **[10]** and understanding of the matters set forth in his affidavit. As evidence thereof, I am executing both of the affidavits on the 15th day of September, 1976. As it relates to the reasons for your recommendation of the plea bargaining, Mr. Murphy, would you spread those upon the record please.

MR. MURPHY: Yes, your Honor. Well, the Court has set forth very clearly and in full exactly what the recommendation of the State is, that is, that on the first count, defendant Ouimette be sentenced to three years at the A.C.I. and that sentence be suspended and that he be placed on probation for a period of four years, this probation to commence from and after his release from the A.C.I. on the charges that he is presently serving time on and a similar disposition on Count 3, those two probationary periods and three-year sentences to run concurrently. The reasons for this recommendation which the State feels is reasonable and I believe the reasonable nature of those recommendations is reflected in the fact that they're supported by the prosecuting department in this case, the R. I. State Police. The evidence against Ouimette as the Court has indicated, is primarily that which would render him liable as a principal in this case. We have no witness who can put Mr. Ouimette in direct physical contact with any of the victims. At the time the information was returned, we did have such a witness, however, at a Disciplinary Board hearing held at **[11]** the Department of Corrections at the A.C.I., maximum Security section, that witness, who was a guard, changed his testimony and indicated in fact he had not seen any physical contact between Mr. Ouimette and the victim. That rendered our case somewhat more -- somewhat less strong than we had originally felt it was when we signed this information. What we have, your Honor, is a situation

where we have several guards who would testify that Mr. Ouimette present and had a weapon in his hand, a weapon that was subsequently found and identified. Beyond that, and the fact that we have a motive for the attack, we have very little other evidence against this man. He is a person who's due to be released from the A.C.I. very shortly. The State Police Department and the Department of Attorney General concurs in the feeling it would be a far greater advantage to the people of the State of R. I. and to the police departments throughout the State to have any inmate who's getting out of prison have some period in which there would be a probationary or parole type probation period during which his activities could be supervised and that is the feeling that leads to this recommendation. If we had gone to trial, it is the considered opinion of myself and the police officers who worked on this case, that there would be a very good likelihood that this man would be found guilty of some charge. However, there was a very good chance that he would be found guilty of a charge, only a misdemeanor, **[12]** a lesser included offense; that is, one in which he had possession of the knife. In that case, he would be liable only for an additional year sentence, arguably consecutive to the time he is now serving, but it would not at all provide us with the type of probation we're obtaining under this disposition.

There's also other factors that enter into the plea recommendation, your Honor, and those being that the evidence against the other defendants is stronger, however even with respect to those defendants, we do not have any cooperative witnesses in this case. For those reasons, your Honor, we're making the recommendation of a suspended sentence with four years probation.

MR. DIBIASE: Your Honor please, in the course of preparation of this case, I've spoke to every prospective State witness, except one Mr. Dana

Ericksson. The following representation I am about to make as a result, you might say, of my first-hand investigation of this matter. The incident that is before the Court was one that was extremely spontaneous in nature. It was not a situation where inmates were lying in wait for another inmate. The day began with a Mr. Pasco Meo going to a Disciplinary Board and from the information furnished me by the correctional officers, he was high on narcotics, became extremely uncontrollable, went to the area called the South State wing at that location, armed himself with both a pool stick - a broken **[13]** pool stick -- and a homemade knife, which was later found in the vicinity by Mr. Mark Ericksson, corrections officer. When Mr. Meo got into the South State area, he was raving mad. He attempted to incite a riot in that area. He attempted to bring the entire south State wing into full conflict with any and every inmate in the North State area of that prison. Mr. Meo began to pick up furniture. He began to throw that furniture around. There were two teachers, laymen, who were going into the prison. Their names escape me at this point, they're not in the information. However, we've spoken to them. They proceeded to the area of the rear hall of the South State area and Mr. Meo at that point, began throwing both folding chairs, an aluminum table, which barely missed them. Their description of Mr. Meo was that he was a "raving lunatic." During all of this, Mr. Ouimette was having his visit in the area called Cell 17. He was accompanied by his fiancee at that point. According to correctional officer William O'Donnell, the obscenity and the loudness of Mr. Meo, just progressed to point where Mr. Ouimette had to excuse his visit. To quote Mr. O'Donnell, he said that if be were in that room, he would not have been able to maintain the composure that Mr. Gerard Ouimette did through that type of verbal abuse and that type of embarrassment to a female companion. During this

period that Mr. Pasco Meo was acting up in the South State wing, he succeeded **[14]** in getting one Charles Fenner to come to his assistance. Mr. Fenner was also armed both with a board and with a knife. However, he was somewhat less violent than Mr. Meo.

At this point, correctional officer Femino went to Mr. Meo and attempted to remove the club from his possession. Mr. Meo, in very gruff terms indicated to him, "You'll have to take it from me." Officer Femino then called the rear hall and replied that he had no success in removing the weapon from Mr. Meo. Lt. Janes, who was the officer in charge of that area on that day, proceeded to go into the South State wing and he again, like officer Femino, attempted to remove the weapons from Mr. Meo. Mr. Meo again hurled obscenities at Lt. Janes and said "You'll never get this away from me unless you try to take it." At this point, Lt. Janes came back into the South State, into the rear hall. According to Mr. William O'Donnell, he indicated that Mr. Meo's threats were not singularly directed to Gerard Ouimette, but the entire North State area and that while this was going on, there were a number of inmates in the North State area that were beginning to pile out at the door of North State and they were beginning to proceed to the area of the South State wing. At this point, Mr. Ouimette came out and he maintains vigorously that he did not intend to kill Pasco Meo, but in his own very candid words, "I wanted to bust him in the mouth." He **[15]** went there with that intention. There was again no conspiracy in the sense of a plotted plan, schemed and contrived, planning and meeting of the minds of four inmates. There certainly was an abundant time for that two-minute walk around the - to have the elements of conspiracy met, conspiracy being according to Cruet vs the United States, the most flexible of all crimes for a prosecutor to prove. But my client wants to represent to the Court that during that period, although there may have been a mutual intent

to go there and to use some force on Mr. Meo, not deadly force but some force on Mr. Meo, they did not capitulate or sit down and plan a cold-blooded brutal beating. Once they did get to that area, Mr. Ouimette, as the evidence - the State themselves would show - did nothing to actively partake in abusing either of those two individuals, however be does acknowledge that he was close enough to Inmate Sweet, DiMasi and Gomes to be of any assistance, legally. There's one further aspect that I would like to bring to the attention of the Court, that is again, my very detailed and extensive dealings with the correctional officer involved in this case, involved in the maximum Security unit who have dealings with Mr. Gerard Ouimette. I can begin with Captain Reynolds. Captain Julio Costa. Deputy Warden Brule. Correctional officer Jenckes, I believe it's Lt. Jenckes. Every high-ranking Adult Correctional officer that I spoke to in the **[16]** investigation of this case had nothing but extreme praise for the behavior of Mr. Ouimette during this period of his incarceration. He, according to all of these men who are in charge and overseeing what goes on in that particular area, they indicate to me that he remains in a particular area of his cell. He has on no occasion, ever instigated trouble, never attempted to do any bodily harm to any inmate. They find, quite frankly that this entire incident is tragic, that an inmate was severely beaten, but yet all of their feelings, Mr. Gerard Ouimette is not as culpable in this incident as the people who were actually the victims in this case. That Mr. Meo has been nothing but trouble to everyone from members who have represented him to people who are in the Correctional office staff and on this particular day in question, unfortunately, a tragedy did result. I offer these comments in mitigation of my client's participation in this and and attempted explanation for how a human being can suffer very substantial

injuries, but yet have in a sense, brought them on himself.

THE COURT: Is there anything you'd like to add, Mr. Ouimette?

DEFENDANT OUIMETTE: No, your Honor.

THE COURT: Mr. Ouimette, you have, as you know, a right to a pre-sentence report, which is provided by the statute which is mandatory upon the Court in this kind of a case, **[17]** unless you specifically waive the benefits of that pre-sentence report, since you have been denied your liberty for a period of time, which would be relevant to me. In other words, all I would be able to get from the pre-sentence report really would be what - the fact that you have been in jail and that your counsel says you've been pretty much free of trouble. So if there's no reason, do you wish to waive the benefits of that report?

DEFENDANT OUIMETTE: Yes, your Honor.

THE COURT: Let the record show that the defendant has specifically waived the benefit of the pre-sentence report. Again, Mr. Ouimette, I'm going to accept the recommendation. I'm going to tell you why I'm going to accept it. I think you're entitled to know. This is not the usual assault with a dangerous weapon. It's not the usual beating that we see on our streets that is so much in the newspapers. If it happened on the street, I wouldn't go along with it. I've lived with men. I spent a long hitch in the Army. It's not like jail. I don't pretend that it is, but I have some personal knowledge as how tempers can flare in close confinement. I don't feel that's an excuse for you, but it's a way of telling you I can understand what happened. I can also tell you if you were standing there and you were standing convicted, I would probably give you a long sentence. God forbid, if one of these two people had died, I'd **[18]** be sentencing you to death. I wouldn't have any hesitancy about it at all. I think if you're going to live

by the rule out there that you give a guy a poke in the mouth and it gets out of hand, you've got to be big enough to take what goes with it. I think you and I both know you were pretty lucky you didn't kill this guy.

DEFENDANT OUIMETTE: Yes, your Honor.

THE COURT: If you killed this guy, you'd be sweating it out real good and you wouldn't have some judge like me understanding and going along with it. If you behaved yourself out there and you're a force for good out there and they tell me you are, and you think that going along with you, you're getting a break, then you owe us one out there. Fair enough? If Pasco Meo isn't interested in coming in here and testifying against you, and he's not interested as a victim in coming in here and he's willing to accept the beating that he got, it may very well be that he agrees with your lawyer, that he precipitated it, that he got what he deserved. It seems to me that the State may very well be justified in the over-all procedure on law enforcement to have some kind of a hold over you. That's what the State bargained for. I originally started off not agreeing with the State. I'm persuaded in your case that they're right. I'm not persuaded in the other cases and I have said so. You can tell Mr. Sweet and Mr. Gomes that I still have not been persuaded in their cases, **[19]** that if they come before me, that I'm not going to accept any plea that's not going to involve new time. That may sit badly with you out there, but that's my present disposition. I may be subject to change if there's a greater showing later on, but the only matter before me is Gerry Ouimette.

DEFENDANT OUIMETTE: Judge, those guys are decent guys. They don't want any trouble, you know.

THE COURT: I know they're no trouble, Gerry, but the guy I've got before me is you. I'll impose on each of the counts of this information, a three-year

sentence, to be served consecutive -- to be served at the conclusion of the sentence he is presently serving. I'll suspend the serving of that sentence on each of the counts of that indictment, place him on concurrent four year probation, upon is release from his present confinement.

(Sentence read by the clerk)

THE COURT: Let's us have a complete understanding so Mr. Ouimette understands. My sentence is not from and after today. The three-year sentence I'm giving him is upon the completion of his current sentence or on his release from prison. That three years, Mr. Ouimette, I am suspending and placing you upon your release on for years probation. Understand that?

DEFENDANT OUIMETTE: Yes, your Honor.

[20] THE COURT: That's my sentence.

CERTIFICATION

I hereby certify that the preceding pages, 1 through 20 inclusive, are a true and accurate transcript of my stenographic notes.

/s/_____

Anna Zaino, RPR

Court Reporter

APPENDIX F

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. SUPERIOR COURT

GERARD OUIMETTE :

VS. : MP# 14244

STATE OF RHODE ISLAND :

This matter came on for hearing before Mr. Justice Needham, at the Kent County Superior Courthouse, on February 24th and 25th, 1981.

APPEARANCES

Stephen Famiglietti, Esq. For the State
John Cicilline, Esq. For the Defendant

[2] THE COURT: The Court had mailed down to Kent County, Providence Information 75-1436 which is State versus Gerard Ouimette, which is the Information which is the subject matter of Miscellaneous Petition 14244.

The Court has before it for decision an application for post-conviction relief. The sole ground specified in the application for post-conviction relief is that as to each count there was no factual basis for the entry of the plea.

The State has filed an Answer as required by the Statute denying the averment as it relates to the factual basis for the plea.

The Court construes the language used in the application that as to each count there was no factual basis for the entry of the plea to relate to the factual

basis to support the charges against the Defendant. The Court is required, under Rule 11 of the Rules of Criminal Procedure, to determine whether there is a factual basis for the plea, the Court may accept the plea. Otherwise, the Court is admonished by the Rule that the Court shall not enter a judgment upon a plea of guilty or nolo unless it is satisfied that there is a factual basis for the plea. Rule 11 and other pertinent sections requires the Court to make **[3]** inquiry of the Defendant concerning the voluntariness of the plea.

In Flint vs. Sharkey, the Supreme Court in a 1970 Decision written by Justice Kelleher, in reaffirming the Bishop case and the Boykin case, the latter being a Supreme Court of the United States case, indicated that "a plea will be vacated unless the record shows that the Court has conducted an on-the-record examination of the Defendant before accepting his plea to determine if the plea is being made voluntarily, with the understanding of the nature of the charges and the consequences of the plea." I will not quote from the Bishop case, but the same substance is contained in Bishop as is contained in Flint, and each of those cases are founded in the Boykin case.

The Court reviewed memoranda submitted to it by Counsel representing the Defendant last night, including the Rhode Island cases decided subsequent to the taking of the plea in this case and including the cases in Rhode Island which are interpretive of the Court's obligation under Rule 11.

The Bishop case refers to Rule 11 as it existed under the Federal Rules of Procedure. Our State Criminal Rule 11 is substantially the same as the Federal Rule.

There is no claim here that the plea was not **[4]** voluntary, and there is no claim here that the Defendant did not enter a voluntary plea. The sole claim is that on the record there was no factual basis for the plea.

I've reviewed the Information to refresh my recollection, since some reference was made in argument before me, of the surrounding circumstances in which the plea was taken, and while in testing the sufficiency of the record before the Court who accepted the plea, the Court is confined to the record as evidenced by the transcript agreed upon by Counsel, the Court is impelled in giving this decision to recount at this time the situation which gave rise to the plea negotiations.

The matter of State versus Ouimette, Criminal Information, Providence, 75-1435 was about to proceed to trial. Certain law enforcement agencies, including the Attorney General's Department, were less than enthusiastic about proceeding against this Defendant. As a matter of fact, some two days passed during which by trial by a jury took place. The last of those people involved in plea negotiations to assent to the negotiated plea was the Justice who presided. On the transcript, which is the subject matter of this Miscellaneous Petition, that inference is clearly indicated in a conversation between the Court and the **[5]** Defendant. While the Court did not, as the transcript says, participate in the give and take of the negotiated plea, the Court became privy to what was determined prior to the time it gave its assent. It is fair to state, and it is implicit in the record before me, that the State of Rhode Island and law enforcement agents were more interested in getting a hold on the Defendant, Ouimette, than in prosecuting him under the Information which they had brought. That attitude permitted the Defendant to negotiate a disposition which would result in no additional time to serve. This fact was the stumbling block with this Justice at the time the plea was negotiated. Likewise, that is referred to in the record.

The Defendant was willing to plead, but would not plead to any assault with intent to commit murder. The specific intent to commit murder was the

original charge. This Defendant had no gripe with the other victim. His only gripe was with Pasco Meo.

The Court has reviewed what Mr. Murphy spread upon the record. Pasco Meo had been seriously injured. He was almost killed in this assault, and that is implicit on the record in an exchange between the Defendant and this Justice. The State establishes on the record directly and indirectly that Pasco Meo, **[6]** who would not testify and who was less than cooperative, had received injuries and wounds; that the initial confrontation of Pasco Meo was with the Defendant, Ouimette, through a verbal exchange; that the Defendant, Ouimette, was seen with a weapon; that Sweet, Gomes and DiMasi, three inmates, one awaiting trial, Mr. Di Masi, and the other two actually convicted, left with this Defendant from the north side to go to the south side of the A.C.I.; that it took some time to go; that this Defendant stood by while Pasco Meo was severely beaten. The State volunteered that it had no eyewitness to the fact that the Defendant placed his hands upon Pasco Meo or in any way had contact with Pasco Meo.

The Court directed questions to the Defendant primarily to ascertain whether the plea was voluntary and done with knowledge of the facts which constituted the offense and the consequences of the plea.

Much has been made in argument before the Court that when the Defendant said, "Well, no. Actually, I went over there to bang him in the mouth, but it didn't work out that way," that that was a repudiation of the representations of Mr. Murphy. The Court does not interpret that to mean, nor does a fair reading of this transcript imply, that that's a repudiation by Mr. Ouimette of the representation made by Mr. Murphy. **[7]** A fair interpretation of what was said and understood as a result of that representation is gleemed when one understands that Mr. Ouimette had spoken to his attorney and was

vehement in his denial of the original charge of assault with intent to murder. His attorney said, in explaining his relationship with Mr. Ouimette in the plea negotiations, "But my client wants to represent to the Court that during that period, although there may have been mutual intent to go there and to use some force on Mr. Meo, not deadly force but some force on Mr. Meo, they did not capitulate or sit down and plan a cold-blooded brutal beating. Once they did get to that area, Mr. Ouimette, as the evidence--the State themselves would show--did nothing to actively partake in abusing either of those two individuals, however he does acknowledge that he was close enough to Inmate Sweet, DiMasi and Gomes to be of any assistance, legally."

The interpretation of the language, "Well, no. Actually, I went over there to bang him in the mouth" was interpreted by the Court at the time it was made as a representation by this Defendant that he could fight his own battles, that he had been insulted, that he went over there to belt him in the mouth. The Court then had an exchange, "It got kind of out of hand?" "THE DEFENDANT: Yeah, it got kind of out of hand." **[8]** There is further exchange with the Court, "Well, you realize by tendering this affidavit that you're admitting that it happened that way," meaning that it got out of hand, "and that it got out of hand, that you encouraged your friends to go out there and help you administer this beating and that you agreed to go out there and give him a beating."

Defendant answered: "Yes."

I would be less than honest if I did not state there is no recitation by the Court that the elements of the offense are A,B,C,D and E, and that perhaps in retrospect, this being one of those instances where in hindsight, the system now places more emphasis upon procedure than upon substance, and that perhaps in retrospect a procedure followed by this Justice at that time of laying out the specific elements

of the offense and having this Defendant interrogated as to each element would present a more perfect record for review at this time. However, the Supreme Court has said that I must be certain, that there is a factual basis for the reduced charges.

An examination of the record shows, and the full transcript supplied by Counsel will bear out, that there were inmates both on the north side and the south side who were armed. This Defendant was observed to have been **[9]** armed. He was in a cast. He was not as mobile as he would have been without the cast. He acknowledged that he went over there with friends, that his original intent in going over there was to bust him in the mouth, whether that was by a fist or by a weapon, it did not appear on the record, but he was going over there to bust him in the mouth; that what happened got out of hand, that Pasco Meo was almost beaten to death in this exchange; that he and his friends were together going from north to south, that if he stood by encouraging his friends to administer the beating, he was punishable as a principle. His attorney acknowledged that the time interval was sufficient, while there was no specific agreement to go over, the exchange between the Court and this Defendant and the representations by Mr. DiMasi indicate that the factual circumstances are susceptible of giving rise to an inference that there was an agreement.

The Court has reviewed the record and concludes that on a fair reading of this record, that there is an was and that the Justice who interrogated this Defendant was then satisfied, as he is now satisfied, that there was a factual basis for the charge against him as amended.

There is no claim that his plea was not voluntary. It was prompted because it involved no further time and **[10]** would place him on probation for a certain period after his release.

For the reasons stated, the Court will deny the application for post-conviction relief. To that decision, the Defendant's exception is noted.

The Clerk will transfer the file and the Information to Providence County, where, Mr. Cicilline, you may take whatever action you deem necessary in Providence.

MR. CICILLINE: Judge, as your Honor understanding the backlog in the Supreme Court will make it possible--or not make it possible for this Defendant to receive a prompt hearing. The sentence involved in this case is one of three years. Additionally, the case on which they move to adjudge him a violator is scheduled for trial on April 10th. In view of all those circumstances, and I would point out to the Court the Defendant intends to appeal your Honor's decision, I--

THE COURT: I would have been surprised, Mr. Cicilline, to learn otherwise.

MR. CICILLINE: I would now move that he be admitted to bail pending appeal. I think there's a fairly substantial issue involved.

THE COURT: Mr. Cicilline, I know that the Supreme Court has admitted to bail in post-conviction relief. May I ask, sir, does not our Statute say that this is a **[11]** civil proceeding, post-conviction relief?

MR. CICILLINE: Yes, it does.

THE COURT: He is not being held in custody by reason of any matter before me.

MR. CICILLINE: Well, he's being held in custody on this case.

THE COURT: No, he's being held in custody on an order of a justice of the Court who is holding him without bail, is he not, on a Rule 32F violation?

MR. CICILLINE: Right.

THE COURT: Now, the 32F violation is a violation of 75-1436, is it not; that case isn't before me.

MR. CICILLINE: May I have one moment, your Honor?

THE COURT: You may. The only case before me is a Miscellaneous Petition. The basis for your Miscellaneous Petition is the fact that you desire to set aside the suspended sentence. But, the only case before me is the post-conviction relief, and the post-conviction relief is a civil proceeding and I don't know where I have any jurisdiction to even consider a motion to bail on post conviction relief.

MR. CICILLINE: I think, obviously, the judge who hears my motion on bail in 75-1436 is going to say he does not have the benefit of having heard what you heard this morning and yesterday, and that he does not know **[12]** whether or not a substantial questions is involved. He's going to suggest that because of the absence of that, he's not in a position to grant bail. But, I would say that in other cases in which post-conviction bail has been set, and I believe one is Feng, F-E-N-G, which was a post-conviction--

THE COURT: That was set by the Supreme Court, was it not?

MR. CICILLINE: I understand, but I don't see any difference in that case. It's the establishment of a precedent by the Supreme Court.

THE COURT: He filed a post-conviction relief application. Wasn't he actually confined at the time, seeking to set aside?

MR. CICILLINE: That's exactly what his situation is.

THE COURT: He's not confined on any sentence to set aside this. You brought an application for post conviction relief which is a civil proceeding.

MR. CICILLINE: Which is based on Indictment 95-14--

THE COURT: Which is based upon the Information.

MR. CICILLINE: Your Honor has before you the Information this morning.

THE COURT: I don't have the Information before me. **[13]** I have physical possession of it. The reasons I ordered it down was to review the affidavit which was filed in this case and to review the docket sheet as it related to when this case proceeded before me for trial, but the only matter before me is what you have filed.

MR. CICILLINE: But, understanding the problem that Judge Borcier or any judge in Providence would have with regard to not being aware of the argument that took place in this matter, would your Honor object to having my get authorization from Judge Borcier to have 75-1436 down there for that exclusive purpose?

THE COURT: What you're really asking, reduced to its least common denominator, is that he be admitted to bail because you're raising "a substantial question" concerning a factually basis for the plea.

MR. CICILLINE: Yes, your Honor.

THE COURT: And that pending the Supreme Court's determination of that question, that the violation hearing not take place on 1436.

MR. CICILLINE: Yes, your Honor, I think if I were to appeal this decision, one manner in which I could get to the Supreme Court would be by Habeas corpus, that would necessarily consolidate both cases, the 1435 and the Miscellaneous Petition. What I'm suggesting is that the Supreme Court is obviously going to say that's **[14]** a matter that ought to have been taken up with the trial justice before we will review the question of bail. It's not your ordinary situation.

THE COURT: If you're asking for bail and a continuance of the 32F--

MR. CICILLINE: I'm not asking you to continue the 32F. I'll take that up with Judge Borcier. What I'm asking you is to set bail pending appeal, and I say that because you have the benefit of what's transpired

here. Judge Borcier might not be in a position to understand that there is a failure substantial issue.

THE COURT: Mr. Famiglietti?

MR. FAMIGLIETTI: Your Honor please, I believe the Court was correct in stating that the Defendant is not at this time serving a sentence on the post-conviction relief matter. He is presently confronted with the potential sentence in that situation which is three years with a three-year suspended sentence. He is presently being held without bail as an alleged violator of the probation that went along with that three-year suspended sentence, so it is not a situation, as such, as the situation was with Feng. I'm sure your Honor is familiar with that where the Defendant had been sentenced on that charge. He filed a petition for post-conviction relief. The petition was denied by the **[15]** trial court. And, pending his appeal and a decision by the Supreme Court, the Supreme Court decided in that particular case that they would, because it was a highly unusual case, they would set bail. There are two problems: One, he's not being held, he's not serving time.

DEFENDANT, OUIMETTE: Who is? You?

THE COURT: Just a minute, Mr. Ouimette.

MR. FAMIGLIETTI: He's not serving time on the matter which is the substance of the base of a post conviction relief.

Secondly, even if that were the case, and it is not, this Court does not have the authority to set bail. I think a reading of Fend makes it clear that the only court that has the constitutional authority to set bail pending post-conviction relief is the Supreme Court. So, the State would respectfully request--

THE COURT: How do you gather that from Feng?

MR. FAMIGLIETTI: I do not have Feng before me. If I could be provided with a copy of the case, I could point out the exact language in that case.

THE COURT: What's the citation?

MR. FAMIGLIETTI: It's in the advance sheets. I believe it's two advance sheets, Volume 2 of the advance sheets.

[16] THE COURT: Volume 2 of the compilation that we now have in distribution?

MR. FAMIGLIETTI: I believe so, your Honor. I know that, your Honor, because I was confronted with this very same issue presently approximately a week ago before Judge Gallant. I had the case before me at that time, but I do not have the case before me today because I wasn't aware of the fact we were going to be--

THE COURT: Go into my chambers. You will find the volumes you desire to look at in my chamber. Go out the door, they're on the end of the file cabinet.

MR. FAMIGLIETTI: I've found the case, your Honor. It's a lengthy decision. I'd like a moment to look at the section.

THE COURT: Alright. Before you start to read that, Mr. Cicilline, my recollection of this Court's authority on post-conviction relief to set bail and to make other orders as it relates to the Criminal Procedure which is the basis of the application, is in the event that I grant relief. If I grant relief, I then have the authority to set bail in 95-1436 to reinstate the plea, to set bail or make any other order. That's my recollection of post-conviction relief as it relates to this Court's authority to set bail.

Now, what I've done in this proceeding is to deny **[17]** the application. I am not granting an application, so as to set aside the plea and reinstate it. Were I to do that, then the application for post-conviction relief Statute says that I may then, having granted it, admit the Defendant to bail or make any other order as it relates to his care, custody and control, pending disposition of the criminal case against him. That's my recollection of it, and I know of no authority that I have to set bail. Mr. Famiglietti

says he has some authority that he would like to put upon the record.

MR. CICILLINE: If I may just say, it seems to me that it would not make an awful lot of sense to say that you have some authority to set bail in a post conviction application, but only in the instance where you've granted the application.

THE COURT: That's what the Statute says.

MR. CICILLINE: I don't believe the Statute says anything about that.

THE COURT: You don't believe that?

MR. CICILLINE: No, I don't.

THE COURT: Bring me Volume--What is it, 9-1?

MR. CICILLINE: 10-9-1. I believe that the other provisions of the General Laws authorize a Superior Court Judge to set bail--

THE COURT: In criminal cases?

[18] MR. CICILLINE: In any instance in which it's required. The Statute also refers to setting bail in civil cases. If we could just have maybe a five or ten minute recess, I'll be able to locate those Statutes for you.

THE COURT: I'm aware of statutes in similar cases where bail bay be set in cases where the Court originally allowed a writ of arrest where a defendant was arrested about to flee the State without leaving assets, the Court is empowered to set bail in that proceeding. The Court is permitted to set bail on the domestic relations side in certain instances in civil proceedings.

MR. CICILLINE: Judge, the real issue is on setting bail is the man is being held, okay? If there is a real question about the issue, the Supreme Court--

MR. FAMIGLIETTI: Your Honor, it would be Volume 2A.

MR. CICILLINE: The Supreme Court in State against Murphy talked about bail being a device that strikes a balance between natural reluctance to

incarcerate someone before final conviction and the State's interest in being sure he's there for the disposition of this case. I think that's aprepros of this situation. Why should he go to jail for one or two days or however long it takes, in this case it will probably be a longer time **[19]** than that, when he's contesting the very foundations of the right to send him there?

There is no question that he's going to absent himself from the jurisdiction. I think everybody agrees that his ties are substantial that he be here. All I'm suggesting is --

THE COURT: Mr. Cicilline, I don't doubt that Mr. Ouimette will be where he's supposed to be when he's supposed to be there. I don't have any doubt about that at all. I'm not arguing with you for the sake of argument. What I'm saying is that in 75-1436 he's on his recognizance of a thousand dollars to keep the peace and be of good behavior. That's the recognizance, that's the hold on him, actually, in 1436 at the present time, when he was given the suspended sentence. It began at the time he was released. He ordinarily has only his recognizance to keep the peace and be of good behavior, report to his probation counselor. Now, that's what the last Order which was entered, before Judge Borcier ordered him held without bail on a 32F notification. Now, you bring a civil action before me. I'm not holding him on any civil action. I have denied relief.

MR. CICILLINE: Judge, could we take a five-minute recess and give us an opportunity to--

[20] THE COURT: Just a moment. The Court says in 10-9.7, "Hearing, Evidence and Order." "A record of the proceedings shall be made and preserved. All rules and statutes applicable on civil proceedings shall apply except that pretrial discovery proceedings shall be available only upon order of the Court. The Court may receive proof by affidavits, depositions, oral testimony or other evidence and may, if deemed appropriate, order the applicant be brought

before it for hearing. If the Court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The Court shall make specific findings of fact and state expressly the conclusions at law, relating to issues presented. This order is a final judgment." The Statute gives me authority in a civil proceeding to enter an order effecting the criminal matter which is the subject matter of this civil proceeding as it relates to bail, retrial, but only if I decide in favor of the applicant.

Ten-minute recess.

(Recess taken.)

* * * * * * * * *

[21] (The following proceedings were held in chambers)

THE COURT: The Court is alone in chambers with the court reporter, having been informed by the reporter that the Defendant has ordered a copy of the decision denying his application for post-conviction relief, including that portion of the decision on the oral motion to be admitted to bail.

As the matter concluded in open court, the Defendant's Counsel requested a short recess, and the Court, after reading a certain portion of the Statute concerning post-conviction relief into the record, granted the motion for a short recess. During the recess, the Court conferred with Counsel and reviewed with Counsel the Supreme Court's opinion in the case of State versus Feng decided October 3, 1980 and reported as 2RIAS 848. Upon completion of that review with Counsel, the Court inquired of Counsel as to whether or not it was necessary for us to go back on the record in open court. Both Mr. Famiglietti and Mr. Cicilline indicated that it was not.

In view of the fact that the Court made observations concerning its ruling with regard to said

pending appellate review of the denial of the post-conviction application during the in-chambers conference, the Court has determined that its observations should be spread **[22]** upon the record.

First of all, the Court reviewed with Counsel the Supreme Court's review of State versus Abbott, 213 RI 480, 322 A.2d, 33 (Abbott I), and in particular Abbott II, 117 RI 219, 366 A.2d, 1134.

Our Supreme Court has indicated in Feng that it would analyze the Supreme Court's power to grant bail pending review of an application for post-conviction relief. After first rejecting the contention of the appellant in Feng that the Rhode Island Legislature had impliedly adopted the ABA standards relating to post-conviction remedies, our Supreme Court concluded that it had the inherent power to grant bail pending appellate review of the trial court's denial of a post-conviction application. That court clearly indicated that it truly would be an unusual case which would result in the granting of such bail. It observed, "We shall therefore require an applicant who requests bail to show that incarceration pending review of his application of post-conviction relief would be manifestly unjust." The Court agreed with the observations of Justice Douglas that bail pending appeal of an unsuccessful collateral attack on a final conviction should be granted only in exceptional cases.

The Court further observed to Defendant's attorney **[23]** that the denial of the post-conviction application does not result in the confinement of the Petitioner, nor is the Petitioner in post-conviction application now confined as a result of a final judgment in the criminal proceeding wherein he now seeks to set aside his plea for lack of a factual basis for that plea.

The present status of the criminal case, 75-1436, is that he stands convicted with a three-year suspended sentence, four years probation (which

probation will expire September, '81) and has been released on his personal recognizance. There is, however, an allegation brought by the Attorney General pursuant to a 32F notification (RI rules of Criminal Procedure) that the State claims that he is a violator of the sentence imposed upon him pursuant to the plea which he rendered. Another Justice of this Court has, as a result of the 32F notification, held him without bail pending a violation hearing on that assertion.

The Court informed Defense Counsel that under the totality of the circumstances that it has not jurisdiction to admit a defendant to bail on his post-conviction application; that if, in an appropriate case, were the applicant denied his liberty as a result of a sentence claimed to have been illegally and unconstitutionally imposed, then it would seem under State versus Feng **[24]** whose facts are substantially identical to the case at bar, that an application to the Supreme Court pending appellate review might be made and in the Supreme Court's language, would be granted "only in those cases where the incarceration pending appeal would be manifestly unjust." Counsel concluded after those remarks were made that it would be unnecessary to bring the Defendant to the courtroom and to spread upon the record these conclusions. Initially, the Court concurred with that opinion. However, inasmuch as a transcript has been ordered and for the benefit of the Supreme Court who must review not only the denial of the post-conviction application, but perhaps the propriety of the denial to admit the applicant to bail, I have hastened to reduce to writing that which I conveyed to Counsel in chambers.

****

C E R T I F I C A T E

I hereby certify that the foregoing pages, numbered 1-24, is a true, accurate and complete transcript, according to my stenographic notes taken at the time and place aforementioned.

/s/_____
Court Stenographer